TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 908.

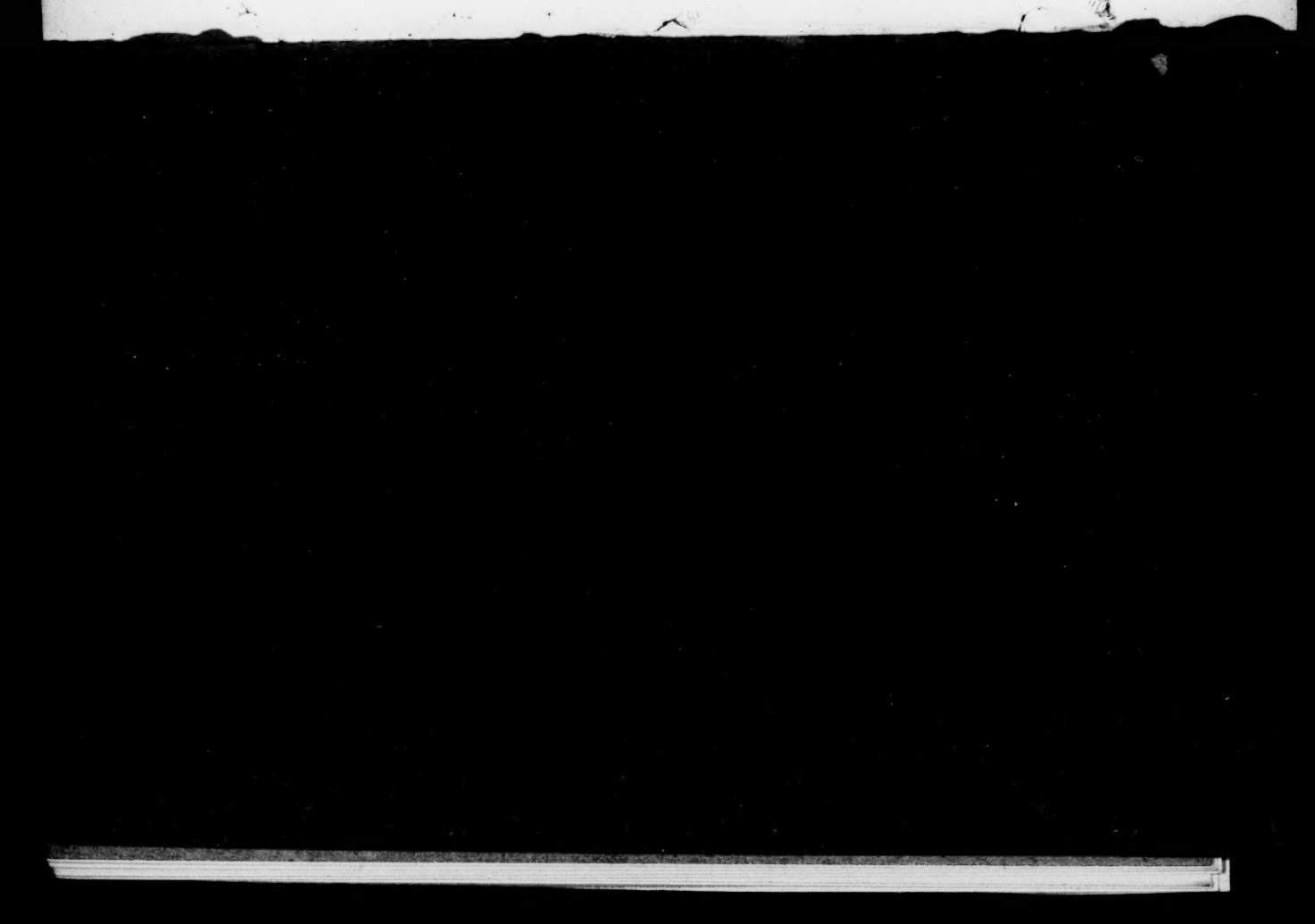
CHARLES T. CROMWELL, PLAINTIFF IN ERROR,

VS.

THE COUNTY OF SAC.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED NOVEMBER 1, 1876.



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4 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the district of Iowa, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Charles T. Cromwell, plaintiff, and The County of Sac, in the State of Iowa, defendant, a manifest error hath happened, to the great damage of the said Charles T. Cromwell, as by his complaint appears—

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 22d day of November, A. D. 1875.

[SEAL.] GEORGE B. CORKHILL,
Clerk U. S. C. C. District of Iowa.

(Indorsed:) Chas. T. Cromwell vs. Sac County. Writ of error. J. N. Rogers, atty. for plff.

5 In obedience to the foregoing writ of error, I, Edward R. Mason, clerk of the circuit court of the United States for the district of Iowa, do hereby certify and return that hereto annexed is a full, true, and complete copy of the record and proceedings, and all things concerning the same, in a certain cause wherein Charles T. Cromwell is plaintiff, and Sac County, Iowa, is defendant, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original citation is hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said court at my office, in Des Moines, in said district, this 23d day of September, A. D. 1876.

[SEAL.] EDWARD R. MASON, *Clerk.*

5½ Pleas in the circuit court of the United States of America in and for the district Iowa, at a term thereof begun and holden at the United States court-room in the city of Des Moines and district aforesaid, on the second Monday of October, the same being the eleventh day of October, A. D. 1875, before the Hon. John F. Dillon, United States circuit judge for the eighth circuit, and Hon. James M. Love, United States district judge for said district of Iowa.

6 *Petition.*

Circuit court of the United States, district of Iowa.

CHARLES T. CROMWELL
vs.
THE COUNTY OF SAC, IN THE STATE OF IOWA.

To the said circuit court:

Your petitioner, Charles T. Cromwell, a citizen of the State of New York, claims to recover of the County of Sac, in the State of Iowa, a municipal corporation created by the laws of the State of Iowa, the sum of ten thousand dollars.

1st. And for cause of such claim your petitioner states that the said county of Sac heretofore, to wit, on or about the 1st day of October, A. D. 1860, executed and delivered to some person to your petitioner
7 unknown a certain bond or writing obligatory, sealed with the seal of said county, and signed by the county judge thereof, dated the day aforesaid, whereby said county promised and obligated itself to pay to the bearer the sum of one thousand dollars on the first day of May, A. D. 1868, at the Metropolitan Bank, in the city of New York, with interest at the rate of ten per cent. per annum from Oct. 1st, 1860, payable annually on May 1st in each year at the bank aforesaid; for which said interest coupons or interest-warrants were attached to said bond, numbered from 1 to 8 inclusive, a copy of which said bond is hereto annexed, marked "Exhibit A," and made a part hereof, except that said Exhibit A differs from the bond herein mentioned in
8 that it is numbered 10 and is payable May 1st, 1871, whereas the bond in this count mentioned is numbered 7, and is payable May 1st, 1868, and a copy of one of said coupons is hereto annexed marked "Exhibit B," and made a part hereof.

Petitioner further states that he is now the owner of said bond and coupons therein hereinafter mentioned; that no part of said bond has ever been paid, and that of said coupons No. 8 still remains due & unpaid, (of which said coupon Exhibit B is a copy,) and that said defendant still neglects and refuses to pay the same, although often requested so to do.

2d. And, for a further and additional cause of action, petitioner states that the said county of Sac, heretofore, to wit, on or about the
9 1st day of October, A. D. 1860, executed and delivered to some person, to your petitioner unknown, another certain bond or writing obligatory, sealed with the seal of said county, and signed by the county judge thereof, dated the day aforesaid, whereby said county promised and obligated itself to pay to the bearer of said bond the sum of one thousand dollars on the first day of May, A. D. 1869, at the Metropolitan Bank, in the city of New York, with interest at the rate of ten per cent. per annum from October 1st, 1860, payable annually on May 1st in each year, at the Metropolitan Bank aforesaid, for which said interest coupons or interest-warrants were attached to said bond, numbered from 1 to 9 inclusive, which said coupons were signed
10 by the county judge of said county, (of which said bond Exhibit A is a copy, except that Exhibit A is a bond numbered 10, & payable May 1st, 1871, whereas the bond in this count mentioned is numbered 8, and is payable May 1st, 1869, and Exhibit B is a copy of one of the coupons of said bond, viz, No. 8, except that Exhibit B pur-

ports to be for interest on bond No. 7, while the coupons sued on in this count are for interest on bond No. 8, and only further differs from coupon No. 9, herein below mentioned, in that said exhibit is numbered 8 and is payable May 1st, 1868, while said coupon is numbered 9 & is payable May 1st, 1869.)

Petitioner further states that he is the owner of said bond and of coupons No. 8 & 9, being for $100 each, (the interest on said bond,)
11 payable May 1st, 1868, & May 1st, 1869, respectively, and that no part of said bond or of said coupons has ever been paid, nor of the interest thereon since May 1st, 1867, and that said defendant still neglects and refuses to pay the same, although often requested so to do.

3d. And, for a further and additional cause of action, petitioner states that heretofore, to wit, on or about the 1st day of October, A. D. 1860, the said county of Sac executed and delivered to some person to your petitioner unknown another bond or writing obligatory, sealed with the seal of said county and signed by the county judge thereof, dated the day aforesaid, whereby said county promised and obligated itself
12 to pay to the bearer of said bond the sum of one thousand dollars on the 1st day of May, A. D. 1870, at the Metropolitan Bank, in the city of New York, with interest at the rate of ten per cent. per annum from the first day of October, A. D. 1860, payable annually on May 1st in each year at the Metropolitan Bank aforesaid, for which said interest coupons or interest-warrants were attached to said bond, numbered from 1 to 10, inclusive, which said coupons were signed the county judge of said county, (of which said bond Exhibit A is a copy, except that said exhibit is a bond numbered 10 & payable May 1st, 1871, whereas the bond in this count mentioned is numbered 9, & and is payable May 1st, 1870; and Exhibit B is a copy of one of the cou-
13 pons of said bond, viz, coupon No. 8, except that said exhibit purports to be for interest on bond No. 7, while the coupons in this count sued on are for interest on bond No. 9, and said exhibit only further differs from coupons No. 9 & 10 hereinafter mentioned n that said exhibit is numbered 8, & is payable May 1st, 1868, while said coupons are numbered 9 & 10, & are payable May 1st, 1869, & May 1st, 1870, respectively.)

And petitioner further states that he is the owner of said bond, and of coupons 8, 9, & 10 thereof, being for $100 each, & payable May 1st, in the years 1868, 1869, & 1870, respectively; and that no part of said bond or of said coupons has ever been paid, nor any part of the interest thereon, since May 1st, 1867, and that said defendant still neg-
14 lects and refuses to pay the same, although often requested so to do.

4th. And, for further and additional cause of action, petitioner states that said county of Sac heretofore, to wit, on or about the first day of October, A. D. 1860, executed and delivered to some person to your petitioner unknown another certain bond or writing obligatory, sealed with the seal of said county, and signed by the county judge thereof, dated the day aforesaid, whereby said county promised and obligated itself to pay to the bearer of said bond the sum of one thousand dollars, on the first day of May, A. D. 1871, at the Metropolitan Bank, in the city of New York, with interest at the rate of ten per cent. per annum from October 1st, 1860, payable annually on May 1st in each
15 year, at the Metropolitan Bank aforesaid; for which said interest coupons or interest-warrants were attached to said bond, numbered from 1 to 10, inclusive, which said coupons were signed by the county judge of said county, of which said bond Exhibit A is a copy,

and Exhibit B is a copy of each of said coupons, except that Exhibit B purports to be for interest on bond No. 7, whole the coupons sued on in this count are for interest on bond No. 10, and said exhibit further differs from said coupons in that said exhibit is numbered 8, and is payable May 1st, 1868, whereas said coupons are numbered respectively 7, 8, 9, & 10, & are payable May 1st in each of the years 1868, 1869, 1870, & 1871, respectively.

Petitioner further states that he is the owner of said bond and
16 of coupons No'. 7, 8, 9, & 10 thereof, being for $100 each, & payable, respectively, May 1st, 1868, May 1st, 1869, May 1st, 1870, & May 1st, 1871; and that no part of said bond or of said coupons has ever been paid, nor any part of the interest thereon, since May 1st, 1867, and that said defendant still neglects and refuses to pay the same, although often requested so to do.

Wherefore petitioner demands judgment against said defendant, The County of Sac, in the State of Iowa, for the sum of ten thousand dollars, with ten per cent. interest, and for costs of suit.

(Signed) PUTNAM & ROGERS,
Plff.'s Attys.

17 STATE OF IOWA,
Scott County, ss:

I, John N. Rogers, being duly sworn, do depose & say that I am a member of the firm of Putnam & Rogers, attorneys for plaintiff in above-entitled suit; that the bond & coupons sued on therein are now in my possession as such attorney; that I have read foregoing petitions, and that the allegations therein contained are true, as I verily believe.

(S'g'd) J. N. ROGERS.

Subscribed & sworn to by said J. N. Rogers before me this 9th day of April, A. D. 1873.

J. HOWARD HENRY,
Notary Public, Scott Co., Iowa.

(Endorsed:) U. S. circuit court, district of Iowa. Charles T. Crom well vs. The County of Sac, in the State of Iowa. Petition. Filed Apr 10, 1873. George B. Corkhill, clerk. Putnam & Rogers, plff.'s attys.

18 *Exhibit A, annexed to petition.*

$1,000.] UNITED STATES OF AMERICA. [No. 10.

STATE OF IOWA, *County of Sac:*

The county of Sac, in the State of Iowa, hereby promises to pay to the bearer one thousand dollars, on the first day of May, A. D. 1871, at the Metropolitan Bank, in the city of New York, with interest at the rate of ten per cent. per annum from the first day of October, A. D. 1860, payable annually, on the first day of May in each year, at the Metropolitan Bank, in the city of New York, on the surrender of the proper coupons hereunto attached.

(Across the face in red:) $1,000.

This obligation is one of a series of ten bonds of the like sum of one thousand dollars, and payable on the first day of May, A. D.
19 1862, 1863, 1864, 1865, 1866, 1867, 1869, 1870, & 1871, respectively, and numbered one (1) to ten, (10,) inclusive; said bonds being

issued by the said county in accordance with a vote of the legal voters thereof, at a special election holden on Saturday, the 7th day of July, A. D. 1860, pursuant to a proclamation made by the county judge of said county, according to the statutes of the State of Iowa in such case made & provided, for the purpose of erecting a court-house in Sac City, the county-seat of said county, as per said proclamation.

In witness whereof I, Eugenus Criss, county judge of said county of Sac, have hereunto affixed my name and caused the seal of said county to be attached at Sac County, this first day of October, A. D. one thousand eight hundred and sixty.

20 [COUNTY SEAL.] EUGENUS CRISS,
Co. Judge.

Exhibit B, annexed to petition.

The county of Sac will pay, at the Metropolitan Bank in the city of New York, to the holder hereof, on the first day of May, A. D. 1868, one hundred dollars, for interest on bond No. 7, or the same shall be receivable at the office of the county treasurer *at the office of the county treasurer* of Sac County for payment of county tax, at the option of the holder hereof.

[COUNTY SEAL.] EUGENE CRISS,
$100. *County Judge.*

(Endorsed:) Copy. Sac Co. bond No. 10.

21 *Summons, U. S. C C.*

UNITED STATES OF AMERICA,
District of Iowa:

To the marshal of the district of Iowa:

In the name of the President of the United States, you are hereby commanded to summon the County of Sac, a municipal corporation organized under the laws of and a citizen of the State of Iowa, to appear before the honorable circuit court of the United States in and for the district of Iowa, on the first day of the next term thereof, to be begun and holden at the city of Des Moines, on the second Monday of May next, it being the 12' day of May, A. D. 1873, then and there to answer unto Charles T. Cromwell, a citizen of the State of New York, in a plea of debt on bonds and coupons executed by said county, to the damage of said plaintiff in the sum of ten thousand dollars.

Hereof fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at the city of Des Moines, this the 10' day of April, A. D. 1873, and of the Independence of the United States the

[SEAL.] GEORGE B. CORKHILL,
Clerk U. S. Circuit Court, District of Iowa.

22 (Indorsed:) No. 1584. Summons. Circuit court of the United States, district of Iowa. Chas. T. Cromwell vs. Sac County. Filed 29' day of April, 1873. George B. Corkhill, clerk. Putnam & Rogers, attorney for plaintiff; residence, Davenport, Iowa.

This writ came into my hands for service on the 10th day of April, A.

D. 1873, and I served the same on the within-named county of Sac, in the State of Iowa, on the 15th day of Apr., 1873, by reading the same to William Chapin, auditor of said county of Sac, and by delivering a true copy to said Wm. Chapin, at Sac City, in the county of Sac, and State of Iowa.

PETER MELENDY,
U. S. Marshal.
A. BOWERS, *Deputy.*

Marshal's fees: Mileage, (200 miles,) $12.00; service on, $2.00; copy, $1.00—; $15.00.

23 United States circuit court, district of Iowa, May term, 1875.
Saturday, May 15th, 1875.

CHARLES T. CROMWELL
vs.
SAC COUNTY. } No. 1584. Law.

This cause coming on this day for hearing upon the defendant's demurrer to the replication of the plaintiff to defendant's answer, plaintiff appears by Jno. N. Rogers, and defendant by G. Parsons; and the court, after argument of counsel thereon, being fully advised, orders that said demurrer be, and the same is hereby, overruled, and thereupon defendant is given leave to amend its answer.

24 In the circuit court of the United States in and for the district of Iowa.

CHARLES T. CROMWELL
agt.
THE COUNTY OF SAC, IN THE STATE OF IOWA.

Now comes the defendant, by its attorneys, Parsons & Lewis, and for a substitute for its several answers heretofore filed herein and in lieu thereof says:

I. That the said plaintiff ought not to have and maintain his said action, for that hereofore, to wit, on or about the 3d day of August, 1867, he, the said plaintff, commenced an action in this court in the name of Samuel C. Smith against this defendant, for the same identical promises, undertakings, and causes of action in the said petition mentioned,
25 and such proceedings were thereafter had, to wit, at the May term of this court in 1869, that it was determined, ordered, and adjudged that the said plaintiff take nothing by his said plea, and it was further ordered, by the consideration and judgment of this court, that this defendant recover of and from the said plaintiff its costs and charges by it in the said action expended, which judgment still remains in full force and effect, not in the least reversed or made void. The defendant further says the said action so brought in the name of the said Samuel C. Smith was instituted, prosecuted, and carried on by the plaintiff herein, the said Charles T. Cromwell, in the name of the said Samuel C. Smith, solely by and for the sole use and benefit of him,
26 the said Charles T. Cromwell, and that the said Samuel C. Smith had no interest therein, and that he in no way controlled or took any part in the management or prosecution thereof, but the same was in all respects directed, managed, and controlled by the said plaintiff herein for and on his own account, and as the real and sole party in interest therein.

II. For a second and other and further defence and answer to the said several matters in the said petition contained, and the several causes of action therein set forth and alleged, and to each and every and the whole thereof, this defendant says that heretofore, to wit, on or about the 3d day of August, 1867, the plaintiff, in the name of one Samuel C. Smith, brought an action in this court for the same identical causes of
27 action alleged and set forth in *in* his petition herein, upon the interest-coupons attached to the said several bonds, for the interest alleged to have accrued thereupon. Among other things the said plaintiff in his said petition in said action so brought by him as aforesaid alleged that he received the said interest-coupons in good faith before maturity and paid value therefor. That this defendant appeared in said action, and by its attorneys duly filed its answer to the said petition. That the issues so joined came on to be tried afterwards, to wit, at the May term of this court in 1869, and it was thereupon by the consideration and judgment of this court duly ordered and adjudged that the plaintiff take nothing by his said plea, and it was further
28 ordered and adjudged that the defendant recover of and from the plaintiff its costs and charges by it in the said action expended, which judgment so rendered as aforesaid *and* still remains of full force and effect.

The defendant further says that the said action was instituted and prosecuted by the plaintiff herein in the name of the said Samuel C. Smith, but for the sole use and benefit of him the said plaintiff herein, and that he in all respects directed, controlled, and managed the same.

The defendant further says that at the time that the plaintiff herein received the said bonds upon which this action is brought the said coupons so sued upon in the name of the said Samuel C. Smith were attached thereto and formed a part thereof, and that they were at
29 all times thereafter and up to and including the term of the said judgment held for his use and benefit, and that the petition herein sets forth and alleges the same identical title, claims, rights, and grounds of recovery, and no other, as were alleged and set forth in the petition in said former action as the grounds of recovery upon the said coupons, and which were finally determined and adjudged therein in favor of this defendant as aforesaid.

(Signed) PARSONS & LEWIS.
Deft.'s Attys.

(Endorsed:) No. 1584. Law. Charles T. Cromwell vs. Sac Co. Substituted answer. Filed May 21, '75. George B. Corkhill, clerk.

30 Circuit court of the United States district of Iowa, May term, 1875.

CHARLES T. CROMWELL }
vs. }
SAC COUNTY. }

For reply to the substituted answer filed by the defendant, May 21st, 1875, the plaintiff says:

1st. That he denies each and every allegation of said answer, and of each division thereof.

2d. And for a further and additional reply to the second division of said substituted answer, the plaintiff says that the said action against the defendant, brought in the name of Samuel C. Smith as plaintiff, was

brought upon the interest-coupons upon the bonds herein sued upon, and upon bond number six of the same series which matured on and
31 prior to the first day of May, A. D. 1867, and upon said coupons only. That a true copy of the record and proceedings in said action is hereto annexed marked "Exhibit A," and made a part hereof, and that no issues or matters whatever were adjudicated or determined in said action, except such as appear to have been so adjudicated and determined on the face of the said record; and that it was not adjudicated or determined in the said action whether or not the said plaintiff was or is a holder of the bonds and coupons sued upon herein, or any of them, for value given therefor, and without notice of any defences thereto, on the part of said defendant, as appears by the said record.

32 And the plaintiff further says that he purchased the said bonds Nos. nine and ten, and the said coupons thereon, sued upon hereon, in the city of New York, before the maturity thereof, for a valuable consideration by him paid therefor, and the said bonds and coupons were then & there delivered to him without any notice or knowledge of any defence or equity whatever existing in favor of said defendant against payment of said bonds and coupo s.

And he further alleges that one Edward P. Clark purchased said bonds Nos. seven & eight, and the coupons thereon, herein sued upon, in the city of New York, before maturity thereof, for a valuable consideration then paid therefor by him, and that said bonds & coupons were then & there delivered to him, without any notice or knowledge on his part of any defence or equity existing in favor of
33 said defendant against payment thereof; and that said Clark being such owner and holder of said bonds & coupons, in good faith and for value, afterwards assigned, transferred, and delivered the same to this plaintiff, who thereby became and is now the holder and owner thereof.

PUTMAN & ROGERS,
Plff.'s Attys.

(Endorsed:) U. S. circuit court, dist. of Iowa. Chas. T. Cromwell v. Sac County. Reply. Filed May 21, '75. George B. Corkhill, clerk. Putman & Rogers, plff.'s attys.

34 *Exhibit A, annexed to reply.*

Pleas in the circuit court of the United States for the district of Iowa, held at the court-house in the city of Des Moines, in said district, before the Hon. Sam. F. Miller, one of the justices of the Supreme Court of the United States, sole judge of said circuit court, on Wednesday the 26th day of May, the same being the regular May term of said court, in the year of our Lord one thousand eight hundred and sixty-nine, and of our Independence the 93d year.

GEORGE B. CORKHILL,
Clerk.

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC, IN THE STATE OF IOWA. } Debt. Petition at law.

DISTRICT OF IOWA, *ss:*

35 Be it remembered that on the 3d day of August, in the year of our Lord one thousand eight hundred and sixty-seven, came

Sam'l. C. Smith, Richman & Carskadden, his attorneys, and filed in the office of the clerk of the circuit court of the United States for the district of Iowa, at Des Moines, in said district, *pracipie* for a writ of summons against the county of Sac, in the State of Iowa, which said *praicipie* is in the words and figures following, to wit:

United States circuit court, district of Iowa.

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC, IN THE STATE OF IOWA.

Hon. W. G. WOODWARD,
Des Moines, Iowa.

36 DEAR SIR: Herewith find petition in the case of Samuel C. Smith vs. Sac County, Iowa, which please file, and issue summons to the marshall to be served at once.

Yours, truly,

RICHMAN & CARSKADDEN.

(Endorsed:) Filed August 3d, A. D. 1867. W. G. Woodward, clerk.

On the same day, to wit, the 3d day of August, A. D. 1867, a writ of summons issued out of said clerk's office against said defendant in said entitled cause, which said writ, together with the return of the marshal thereon, is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Iowa.

To the marshall of the district of Iowa:

37 In the name of the President of the United States you are hereby commanded to summon the county of Sac, in the State district of Iowa, to appear before the circuit court of the United States in and for the district of Iowa, at a term to be begun and holden at Des Moines on the third Tuesday, it being the fifteenth day of October next, to answer unto Samuel C. Smith, a citizen of the State of New York, in an action on the bonds, warrants, & coupons of the said county, in which the plff. claims the sum of ten thousand dollars, with interest at the rate of ten per cent. per annum. Hereof fail not.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, at Des Moines, this 3d day of August,
38 A. D. 1867, and the Independence of the United States the 94th.

[SEAL.] W. G. WOODWARD, *Clerk.*

This summons came into my hands on the 22nd day of August, A. D. 1867, and was served on the 24th day of the same month, by reading it to Jno. Alexander, county judge of Sac County, Iowa, and to W. H. Hobbs, clerk, and to Wm. Montgomery, president of the board of supervisors of said county, and leaving with each of them a true copy in said county.

G. W. CLARK,
U. S. Marshal Dist. of Iowa.

Marshal's fees: Mileage, 150 miles, $9,00; service on three, $2.00, 6.00; three copies, 50 c., 1.50—16.50. Paid by plff., Sept. 15th, 1867.

39 (Endorsed:) Filed Sept. 15th, 1867. W. G. Woodward, clerk.

On this day, to wit, the third day of August, A. D. 1867, came said plaintiff, by his attorneys, and filed in said clerk's office his declaration in said entitled cause, which said declaration is in words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Iowa:

To the circuit court of the United States for the district of Iowa:

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC, IN THE STATE OF IOWA. } Petition at law.

Said plaintiff, Samuel C. Smith, a citizen of the State of New York, complains of the defendant, the County of Sac, a corporation
40 existing in the State of Iowa, under and by virtue thereof.

And thereupon said plff. alleges that heretofore, to wit, on or about the 4th day of June, A. D. 1860, the defendant, in its official and corporate capacity, and by its proper and duly-authorized officers and agents, and upon the petition, in writing, of the requisite number of voters of said county, determined to submit to the people of said county the question of the erection of a court-house therein, to cost the sum of ten thousand dollars in the bonds of said county, bearing te' per cent. interest per annum, and the question of levying an annual tax in said county sufficient to liquidate said bonds and pay the same, with accruing interest, at maturity; that thereupon, and on the 4th day of
41 June, A. D. 1860, an order and proclamation was made by the county judge of said county submitting the question aforesaid to the people of said county, which order and proclamation was in the words and figures following, to wit:

"STATE OF IOWA, *Sac County, ss:*

"Whereas a petition, signed by a legal number of the legal voters of Sac County, has been presented to me, asking that measures be taken for the erection of a court-house in said county; and whereas it being prescribed by law that in all such matters the question may be submitted to the people of the county: Now, therefore, be it known that I, Eugene Criss, county judge of said county, in compliance with the law in such cases made and provided, do hereby give notice to the
42 legal voters of said county that the question will be submitted to them on the 7th day of July, A. D. 1860, at which time there will be an election held in the several townships of said county, at the usual hours and places of holding elections in said county, whether or not a court-house shall be erected in said county, to cost ten thousand dollars, in bonds drawing ten per cent. interest per annum, the interest due and one thousand dollars of the principal to be paid annually until the debt is paid; and whether or not a tax shall be levied annually sufficient to liquidate the demands as they become due.

"And I do further declare the manner of voting shall be as follows: Upon said ballots shall be written or printed, 'For the erection of a court-house,' or 'Against the erection of a court-house;' 'For the
43 levy of a tax,' or 'Against the levy of a tax.' And I do further declare that if a majority of the votes be cast affirmatively, then such vote shall decreed to be in favor of the proposition above submitted; and if a majority of the votes so cast are in the negative, it shall be decreed a rejection of the above proposition; the votes to be

returned by the judges of the different precincts to the county court, to be thence canvassed according to law.

"Given under my hand, with the seal of Sac County affixed, at Sac City, this 4th day of June, A. D. 1860.

[SEAL.] "EUGENE CRISS,
"*County Judge.*"

And said plff. further alleges that, in pursuance of said order & proclamation, an election was held in the several townships of
44 said county on the 7th day of July, A. D. 1860, at which a majority of votes was cast in favor of said proposition; and that afterwards, to wit, on the day of A. D. 1860, there was entered on the records of said county, by said county judge, as required by law, the result of said election, in the words and figures following, to wit: "And it appearing to the court, by the return of the sheriff of said county, endorsed on the proclamation, and by other evidence, that due notice was given of said election, by posting up said proclamation, duly signed & sealed, in five of the most public places in said county, including one of the most public places in each of the several townships of said county, and one of them at the door of the court-house,
45 during a period of more than thirty days prior to the day of said election, to wit, from June 4th, A. D. 1860, to July 7th, A. D. 1860, there being no newspaper published in said county; and it appearing to the court that said election was duly held at the time and places named in said proclamation, and the prop'sition therein contained duly submitted to a vote of the qualified electors of said county; and it also appearing upon a canvass of the votes cast at said election, duly made before the board of county canvassers and entered of record, that the whole number of votes cast for and against said propositions were (41) forty-one; of which number there were twenty-three (23) for the erection of a court-house and the levy of a tax, and eighteen votes
46 against the erection of a court house and against the levy of a tax; and the court being satisfied that all the requirements of the statute in such cases has been complied with, and that a majority of the said votes cast are in favor of said proposition entire, submitted as aforesaid, hath caused the said propositions and the result of the vote to be entered of record, and doth proclaim the said propositions entire duly adopted, and made binding on said county, duly authorized to issue the bonds and levy the tax as therein provided, and doth further order that notice of the adoption of said propositions be published for the time and in the manner provided by law."

All of which will appear by reference to the records of said county. Said plff. further alleges that, in pursuance of said election,
47 and by the authority conferred upon him by law, the said county judge made a contract with one W. N. Mesarvey for the erection and construction of said court-house for the sum of ten thousand dollars, payable in the bonds of said county, as aforesaid; and that thereupon the said county judge of said county issued the bonds of said county to the number of ten, (10,) for the sum of one thousand dollars each, payable 1, 2, 3, 4, 5, 6, 7, 8, 9, & 10 years after, respectively, with ten per cent. per annum thereon, payable annually, upon the surrender of the coupons thereto attached, and being payable to the bearer thereof at the Metropolitan Bank, in the city of New York, and being in the words & figures following, to wit:

48 "$1,000.] E pluribus unum. [No. .

"THE UNITED STATES OF AMERICA,
"*State of Iowa, County of Sac:*

"The county of Sac, in the State of Iowa, hereby promises to pay to the bearer one thousand dollars on the first day of May, A. D. 186 , at the Metropolitan Bank, in the city of New York, with interest at the rate of ten per cent. per annum from the first day of October, A. D. 1860, payable annually on the first day of May in each year, at the Metropolitan Bank, in the city of New York, on surrender of the proper coupons hereunto attached. This obligation is one of a series of ten bonds of the like sum of one thousand dollars, and payable on the first day of May, A. D. 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, and 1871, respectively, and numbered from one (1) to ten (10,) inclusive;
49 said bonds being issued by the said county in accordance with a vote of the legal voters thereof, at a special election holden on Saturday, the 7th day of July, A. D. 1860, pursuant to a proclamation made by the county judge of said county, according to the statutes of the State of Iowa in such case made & provided, for the purpose of erecting a court-house in Sac City, the county-seat of said county, as per said proclamation.

"In witness whereof I, Eugene Criss, county judge of said county of Sac, have hereunto affixed my name and caused the seal of Sac County to be attached, at Sac City, this first day of October, A. D. one thousand eight hundred and sixty.

{ SEAL OF THE } "EUGENE CRISS,
{ COUNTY OF SAC. } "*County Judge.*"

50 The coupons attached to said bonds being in the words and figures following, to wit:

"The County of Sac will pay at the Metropolitan Bank, in the city of New York, to the holder hereof, on the first day of May, 18 , one hundred dollars for interest on bond No. , or the same shall be received at the office of the county treasury of Sac County for payment of county tax, at the option of the holder thereof.

"$100.

"EUGENE CRISS,
"*County Judge.*"

And the plff. alleges, and shows to the court, that the aforesaid copies of said bonds and coupons are correct copies of all the bonds and coupons described & issued by said county, as aforesaid, except the numbers thereof and the respective dates of payment of the same. And
51 plff. claims of said defendant the sum of twenty-five hundred & three $\frac{20}{100}$ dollars, with interest at six per cent. per annum from the maturity of the several coupons hereinafter described and set forth; which sum he alleges to be due him from said deft. for and on account of the coupons hereinafter designated & set forth.

2. And for cause of such claim plff. alleges that he is the bearer, holder, & owner of coupon No. 2, annexed to bond No. 2 of the series of bonds hereinbefore described & set forth, for the sum of one hundred dollars, and payable on the first day of May, A. D. 1862, at the Metropolitan Bank, in the city of New York.

3. And for further cause of such claim plff. alleges that he is the bearer, holder, and owner of coupon No. 2, annexed to bond No. 3 of the series of bonds hereinbefore described and set forth, the same being

for the sum of one hundred dollars, and payable on the first day
52 of May, A. D. 1862, at the Metropolitan Bank, in the city of New York.

4. And for further cause of such claim plff. alleges that he is the bearer, holder, and owner of coupon No. 2, annexed to bond No. 4 of the series aforesaid, for the sum of one hundred dollars, payable May 1st, at the place aforesaid.

5. And for further cause of such claim plff. alleges that he is the bearer, holder, & owner of coupon No. 2, annexed to bond No. 5 of the series aforesaid, for the sum of one hundred dollars, and payable May 1st, 1862, at the place aforesaid.

6. And for further cause of such claim plff. alleges that he is the holder & owner of coupon No. 2, annexed to bond No. 6 of the series aforesaid, the same being for the sum of one hundred dollars,
53 payable at the time and place aforesaid.

And the plff. alleges that each and all of the foregoing coupons were presented for payment, at maturity, at the Metropolitan Bank, in the city of New York, and payment thereof demanded and refused; and that thereupon said coupons were each and all protested for non-payment, the costs & expenses thereof being the sum of three $\frac{00}{100}$ dollars; which sum he claims of deft.

7. And for further cause of such claim plff. alleges that he is the holder & owner of coupon No. 3, annexed to bond No. 7 of the series aforesaid, for the sum of one hundred dollars, & payable May 1st, 1863, at the place aforesaid.

8. And for further cause of such claim plff. alleges that he is the holder & owner of coupon No. 4, annexed to bond No. 7 of the
54 series aforesaid, for the sum aforesaid, and payable May 1st, 1864, at the place aforesaid.

5. And for further cause of such claim plff. alleges that he is the holder & owner of coupon No. 5, annexed to bond No. 7 of the series aforesaid, for one hundred dollars, payable May 1st, 1865, at the place aforesaid.

6. And for a further cause of such claim plff. alleges that he is the holder & owner of coupon No. 6, annexed to bond No. 7 of the series aforesaid, for the sum aforesaid, payable May 1st, 1866, at the place aforesaid.

7. And for a further cause of such claim plff. alleges that he is the holder & owner of coupon No. 7, annexed to bond No. 7 of the series aforesaid, for the sum aforesaid, payable May 1st, 1867, at the place aforesaid.

8. And for further cause of such claim plff. alleges that he is
55 the holder & owner of coupon No. 3, annexed to bond No. 8 of the series aforesaid, for the sum aforesaid, payable May 1st, 1863, at the place aforesaid.

9. And for further cause of such claim plff. alleges that he is the holder & owner of coupon No. 4, annexed to bond No. 8 of the series aforesaid, for the amount aforesaid, payable May 1st, 1864, at the place aforesaid.

10. And for further cause of such claim plff. alleges that he is the holder & owner of coupon No. 5, annexed to bond No. 8 of the series aforesaid, for the sum aforesaid, payable May 1st, 1865, at the place aforesaid.

11. And for further cause of such claim plff. alleges that he is the holder & owner of coupon No. 6, annexed to bond No. 8 of the series

aforesaid, for the sum aforesaid, payable May 1st, 1866, at the place aforesaid.

56 12. And for further cause of such claim plff. alleges that he is the holder & owner of coupon No. 7, annexed to bond No. 8 of the series aforesaid, for the amount aforesaid, payable May 1st, 1867, at the place aforesaid.

13. And for further cause of such claim plff. alleges that he is the holder & owner of coupon No. 3, annexed to bond No. 9 of the series aforesaid, for the amount aforesaid, payable May 1st, 1863, at the place aforesaid.

14. And for further cause of such claim plff. alleges that he is the holder & owner of coupon No. 4, annexed to bond No. 9 of the series aforesaid, for the amount aforesaid, payable May 1st, 1864, at the place aforesaid.

57 15. And for further cause of such claim plff. alleges that he is the holder & owner of coupon No. 5, annexed to bond No. 9 of the series aforesaid, for the amount aforesaid, payable May 1st, 1865, at the place aforesaid.

16. And for further cause of such claim plff. alleges that he is the holder & owner of coupon No. 6, annexed to bond No. 9 of the series aforesaid, for the amount aforesaid, payable May 1st, 1866, at the place aforesaid.

17. And for further cause of such claim plff. alleges that he is the holder & owner of coupon No. 7, annexed to bond No. 9 of the series aforesaid, for the amount aforesaid, payable May 1st, 1867, at the place aforesaid.

18. And for further cause of such claim plff. alleges that he is the holder & owner of coupon No. 2, annexed to bond No. 10 of the series aforesaid, for the amount aforesaid, payable May 1st, 1863, at the place aforesaid.

58 19. And for further cause of such claim plff. alleges that he is the holder & owner of coupon No. 3, annexed to bond No. 10 of the series aforesaid, for the amount aforesaid, payable May 1st, 1864, at the place aforesaid.

20. And for further cause of such claim plff. alleges that he is the holder and owner of coupon No. 4, annexed to bond No. 10 of the series aforesaid, for the amount aforesaid, payable May 1st, 1865, at the place aforesaid.

21. And for further cause of such claim plff. alleges that he is the holder & owner of coupon No. 5, annexed to bond No. 18 of the series aforesaid, for the amount aforesaid, payable May 1st, 1866, at the place aforesaid.

22. And for further cause of such claim plff. alleges that he is the holder & owner of coupon No. 6, annexed to bond No. 10 of the
59 series aforesaid, for the amount aforesaid, payable May 1st, 1867, at the place aforesaid.

And plff. alleges that coupons Nos. 2, 3 4, 5, & 6, annexed to bond No. 10, being the five last coupons hereinbefore described, and appearing to be due and payable on the first day of May, in 1863, 1864, 1865, 1866, & 1867, respectively, were in fact due & payable on the first day of May, 1862, 1863, 1864, 1865, & 1866, respectively, and through error and mistake of the officers and agents of said county were made payable one year later than their actual maturity; that said coupons became due, as follows: No. 2 in 1862; No. 3 in 1863; No. 4 in 1864; No. 5 in 1865; No. 6 in 1866; and properly bear interest from said dates.

And plff. further alleges that he is the holder & owner of each and

all the coupons hereinbefore described; that he received the same
60 in good faith before maturity, and paid value therefore; that said coupons were all duly presented at the Metropolitan Bank, in the city of New York, for payment, at maturity, and payment thereof demanded, which was by said bank refused; that the said bonds and coupons aforesaid were issued by said county under and by virtue of legal, competent, and proper authority conferred upon the officers & agents of said county as aforesaid, and the same are valid and legal claims against the deft.; that said bonds & coupons were issued with the seal of said county and the signature of its county judge attached or annexed thereto; that correct copy of each said bonds & coupons is hereinbefore set forth and incorporated into this petition, and
61 excepting the dates & numbers which are afterwards set forth in said petition fully & at large.

Plff. further alleges that said claims are still his property, and that the amount hereinbefore claimed is still due thereon. He therefore asks judgement for said amount, with interest & costs.

RICHMAN & CARSKADDEN,
Attys. for Plff.

(Endorsed:) Filed August 3d, 1867.

On this day, to wit, the 17th day of October, A. D. 1867, of said court, at the regular October term thereof, in the record of the proceedings in said entitled cause is the following entry, to wit:

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC.

62 This cause now coming on to be heard, on the application for time to answer and a continuance, it is ordered that the defendant have leave to answer in ninety days, and that the cause be continued.

On this day, to wit, Wednesday, May 27th, A. D. 1868, at the May term of said court, in the records and proceedings thereof in the said entitled case is the following entry, to wit:

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC.

This day this cause coming on for hearing was continued.

On this day, to wit, Wednesday, Oct. 28th, 1868, at the October term of said court, in the records and proceedings thereof in the said entitled case is the following entry, to wit:

63 SAMUEL C. SMITH
vs.
THE COUNTY OF SAC.

This day this cause coming on for hearing is continued generally.

Answer.

U. S. circuit court, district of Iowa.

SAMUEL C. SMITH, PLFF.,
vs.
SAC COUNTY, IOWA, DEFTS.

The defendant, for answer to plff.' petition, says—

1st. That it denies that any such election as is set out in plff.' petition was called or held; denies that the electors of said county (a majority

of them) voted in favor of building a court-house & issuing bonds in payment therefore; denies that any such bonds or coupons were issued or any such contract let for building a court-house; denies that the county judge had any authority to call such election or make
64 such contract or issue such bonds or coupons. Deft. further denies each & every other allegation in plff.'s petition.

II. The deft. further states that said bonds & coupons were issued without authority of law, & that plff., at the time that he purchased the same, had full knowledge of the facts.

III. That on or about the 21st day of Sept., A. D. 1860, one Eugene Criss, claiming to act as the county judge of deft., in pursuance of a pretended vote of the electors of said county, did make and enter into a contract with one W. N. Meservy whereby it was agreed by the said Meservy to build a court-house for deft. at Sac City, its county seat; said court-house to be commenced on the of , 186 , and completed on or before the 1st day of August, 1862, and the said
65 county judge aforesaid agreed & undertook, in behalf of the county, to pay said Meservy for such house the sum of ten thousand , & to issue bonds on said county to him for said sum, said bonds to run one, two, three, four, five, six, seven, eight, nine, & ten years, & to be for one thousand dollars each, to draw ten per cent. interest from date, and payable on the first day of May each year; that the bonds & coupons set out in plff.' petition were issued in pursuance of, & as a part of, said contract for building said court house, & were delivered to said Meservy on the day they were executed, to wit, the first day of October, A. D. 1860; that the said Meservy has wholly failed and refused to build said court-house, or any part thereof, nor has he done any work thereon or taken any steps towards the build-
66 ing the same, and has in every particular failed & refused to comply with his part of said contract; that the consideration of such bonds and coupons has wholly failed, & according to a statute of Iowa in such cases made and provided, no part of the amount due on said bonds or coupons could be drawn from the county treasury and paid thereon until the work should have been actually commenced in good faith, which has not been done. The defendant states that the plff. had full & complete knowledge of all such facts at the time he purchased said bonds, and took the same subject to the rights & equities of deft. herein.

IV. That said bonds were not issued in pursuance of said vote, and were not payable as directed thereby, and are therefore void.

POLK, HUBBLE & BARCROFT,
Attys. for Deft.

67 *Stipulation.*

In United States circuit court, district of Iowa.

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC. } No. 439.

It is hereby stipulated and agreed by the parties to the above-entitled cause that the same may be tried *to* the court without the intervention of a jury, and that the cou t shall find specially upon the facts.

RICHMAN & CARSKADDEN &
J. N. ROGERS,
Attys. for Plff.
GALUSHA PARSONS,
W. L. JOY,
Deft.'s Attys.

On this 29th day of May, A. D. 1869, at the May term of said court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit:

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC.

68 The issues of fact in this cause having been tried by the court without a jury, pursuant to the written stipulation of the parties on file; and the court having found the facts specially, together with its conclusions of law thereon, that defendant is entitled to judgment in its favor, now, on motion of Messrs. Joy & Parsons, deft.'s attorneys, it is considered and adjudged that the plaintiff take nothing by his suit, and that the defendant recover its costs, herein taxed at $, and that execution issue therefor; to which ruling of the court the plaintiff then and there excepted, and, by agreement of parties, the bill of exceptions shall be settled and signed by the judge as of the present term.

On this day, to wit, the 29th day of May, A. D. 1869, in the record
69 of proceedings thereof in said entitled cause is the following entry, to wit:

United States circuit court, district of Iowa.

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC. No. 439.

This cause now coming on for trial on the issues joined therein, and the plaintiff appearing by J. Carskaddan and J. N. Rogers, his attorneys, and the defendant by W. N. Joy and G. Parsons, its attorneys, the said parties file their written stipulation to try the cause to the court without a jury.

And the court, having heard the evidence & arguments of counsel for the respective parties, makes a special finding, in writing, in the words following, to wit:

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC.

70 In this cause the court, on the evidence, finds the facts to be as follows, to wit:

1st. That an order & proclamation was made by Eugene Criss, county judge of said county of Sac, for submitting to the vote of the people of said county "whether or not a court-house should be erected in said county, to cost ten thousand dollars, in bonds drawing ten per cent. interest per annum; the interest due and one thousand dollars of the principal to be paid annually until the debt is paid; and whether or not a tax shall be levied annually sufficient to liquidate the demands as they become due," in manner and form as the same is alleged and set forth in the plaintiff's petition herein.

2d. That a special election was held in said county on the 7th day of July, A. D. 1860, in accordance with and in pursuance of said
71 order and proclamation; and that said proposition was adopted by a majority of the votes cast at said election.

3d. That the said proposition and the order for the submission of the same, together with a statement of the result of said election, was afterwards, by and under the direction of the said county judge, entered and recorded at large in the office of the said county judge, in the "minute-book" of the county judge & county court, in manner and form as the same are set forth and copied in the petition of the plaintiff herein. That by the said record entry the said order for the submission of the said proposition to the vote of the people appears and purports to have been made at a session of the county court on the 4th day of June, A. D. 1860; but that said record was not in part made and entered in
72 said "minute-book" at that time, nor until after the execution and delivery of the bonds, as hereinafter found; and that the said order was entered in said "minute-book" in June, 1861, after the said Criss had ceased to have any power or jurisdiction over the financial business of the defendant.

4th. That the said Eugene Criss, county judge of said county, having entered into a contract, in behalf of said county, with one W. N. Meservy, for the erection by the said Meservy of a court-house in and for said county, did, on or about October 1st, 1860, execute in behalf of said county, by affixing thereto his signature as such county judge, and the lawful seal of said county, and deliver to said Meservy, in pursuance of the terms of said contract, ten certain bonds or instruments, purporting to be the bonds of said county, dated October 1st,
73 1860, each being for the payment to the bearer of one thousand dollars, with interest thereon at the rate of ten per cent. per annum, payable annually; and which said bonds were severally and respectively payable in one, two, three, four, five, six, seven, eight, nine, & ten years after date, at the Metropolitan Bank, in the city of New York. And said county judge also executed, in like manner, coupons, or interest-warrants, annexed to said bonds, and each of them, for the several annual instalments of interest to grow due thereon as aforesaid, being for one hundred dollars each, & payable to bearer at said bank, or receivable for taxes at the county treasury of the said county, at the option of the holder. Said bonds and coupons were all expressed in the same words and figures precisely, except as to the numbers and date of maturity thereof, & correct copies thereof are contained and
74 set forth in plaintiff's petition herein.

5th. That the said county judge in fact signed, sealed, & delivered said bonds and coupons, as aforesaid, at Fort Dodge, in the county of Webster, & State of Iowa, and not within the county of Sac; and that the contractor, Meservy, gave one of said bonds for $1,000 as a gratuity to the county judge as soon as the same were delivered by said county judge to said Meservy; and no court-house was in fact ever built by said contractor, or any other person, in pursuance of said contract.

6th. That the plaintiff, Samuel C. Smith, was at the time of commencing this action, and still is, the holder and owner of twenty-five of the coupons or interest-warrants aforesaid, being those specified
75 and declared on in the petition herein; that he became such holder by transfer thereof to him before maturity and after the entry of said proceedings in the "minute-book," as hereinbefore found; that said coupons were at the commencement of this action, and still are, wholly unpaid.

And as matter of law, arising upon & resulting from the facts hereinbefore found, the court is of opinion & adjudges that the said bonds & coupons are wholly void as against the said county of Sac, & that the

defendant is entitled to judgment that plaintiff take nothing by his suit and for its costs; to which opinion and judgment the plaintiff excepts.

J. M. LOVE, *Judge, &c.* [SEAL.]

76 I, George B. Corkhill, clerk of the circuit court of the United States for the district of Iowa, do hereby certify the foregoing transcript, from pages 1 to 59, inclusive, to contain a full, true, and perfect copy from the record of all the proceedings of said court in said cause wherein Samuel C. Smith was plaintiff, and the County of Sac was defendants, as the original of the same now remains in my custody; and I further certify that the writ of error sued out by said Samuel C. Smith, plaintiff in error in said cause, is annexed to said transcript.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Des Moines, in said district, this 15th day of Nov., A. D., 1869.

[SEAL.] GEORGE B. CORKHILL,
Clerk.

77 In the circuit court of the United States in and for the district of Iowa.

CHARLES T. CROMWELL
agt.
THE COUNTY OF SAC, IN THE STATE OF IOWA.

Now comes the defendant and demurs to the second division of the plaintiff's reply herein, and for cause of demurrer says the same does not state facts sufficient to avoid the answer of this defendant, for the following reasons:

I. The same does not allege that the question of the purchase of said coupons and of the plaintiff's good faith and knowledge therein, and as to whether he did or did not purchase the same before maturity and pay value therefor, might not have been tried in said former
78 action.

II. It is not denied in said division that the plaintiff herein was the real party in interest in said former action, nor that at the time of the alleged purchase of the bonds upon which this action was brought that the coupons mentioned in the defendant's answer herein, and upon which said former action was brought, were annexed thereto, nor is it alleged in said reply that the plaintiff holds said bonds by any other purchase or title than that by which he acquires the said coupons and by which he held the same at the time of bringing said former action and of the trial thereof; nor does the said reply state any fact or facts showing why the said questions now sought to be raised by said reply were not or could not have been tried in said former action.

79 III. It appears by the petition in said former action, and made a part of said reply, that the said plaintiff in said former action claims to be a bona-fide holder of said coupons as a purchaser thereof before maturity for value; that said allegation was denied by the answer of this defendant in said action, and that same might and should have been tried in said former action.

(Signed)

PARSONS & LEWIS,
Deft's Attys.

(Endorsed:) 1584. Chas. T. Cromwell vs. Sac County. Demr. to 2d count of replication. Filed May 21, '75. George B. Corkhill, clerk.

80 United States circuit court, district of Iowa, May term, 1875.
Saturday, May 22, 1875.

CHARLES T. CROMWELL
vs.
THE COUNTY OF SAC. } No. 1584. Law.

This cause coming on to be heard on the defendant's demurrer to the second division of the plaintiff's reply to the substituted answer filed by defendant on the 21st day of May, 1875, after argument of counsel in support of and against said demurrer, it is considered by the court that the said demurrer be and it is hereby sustained; to which ruling and decision the plaintiff, by his counsel, duly excepts.

81 United States circuit court, district of Iowa, October term, 1875.
Saturday, October 13th, 1875.

CHARLES T. CROMWELL
vs.
SAC COUNTY. } No. 1584. Law.

This cause came on this day for hearing.

Plaintiff appears by Jno. N. Rogers and Nourse and Kauffman, and defendant by Parsons and Lewis; and there came a jury of twelve good and lawful men, to wit, Alex. W. Brownlie, Thomas West, Wm. C. Adsit, Jno. Woods, David Haynes, J. E. Callender, D. W. Crawford, Julius Greef, S. M. Bennett, Archibald Rankin, Thomas Brett, and L. B. Hopkins, who were duly empaneled and sworn to well and truly try the issues joined, and they having heard statement of case from counsel, and a portion of the testimony, were excused until nine o'clock to-morrow morning.

82 United States circuit court, district of Iowa, October term, 1875.
Thursday, October 14th, 1875.

CHARLES T. CROMWELL
vs.
SAC COUNTY. } No. 1584. Law.

This cause came on this day to be further heard; parties appear by their attorneys, and the jury came the same as yesterday; and they, having heard conclusion of evidence and portion of arguments of counsel, were excused until nine o'clock to-morrow morning.

83 United States circuit court, district of Iowa, October term, 1875.
Friday, October 15th, 1875.

CHARLES T. CROMWELL
vs.
SAC COUNTY. } No. 1584. Law.

This cause came on this day for further hearing; parties appear by their attys., and the jury came the same as yesterday; and they, having heard argument of counsel and charge of court; retire to a private room, under charge of a sworn officer, to consider their verdict; and after some time spent in deliberation thereon, they returned into open court the following verdict to wit:

"We, the jury, find a verdict for the defendant. Signed, D. W. Crawford, foreman."

(Signed) D. W. CRAWFORD, *Foreman.*

In addition to the general verdict, the jury returned, under direction of the court, the following special verdicts:

84 1st. Was the plaintiff Cromwell the real owner of the coupons sued upon, in the suit of Smith vs. Sac County, the record, of which has been given in evidence at the time said suit was brought, and did he prosecute said suit in the name of Smith for his own benefit?

Answer. Yes; we, the jury, find the plaintiff Cromwell to have been the real owner of said coupons.

(Signed) D. W. CRAWFORD, *Foreman.*

Was the sale to Smith an actual sale in good faith, or was the same made for the purpose of enabling Cromwell to bring an action in the name of Smith for his own benefit as the real party in interest?

Answer. We, the jury, find that the sale was not in good faith.

(Signed) D. W. CRAWFORD, *Foreman.*

Therefore it was considered ordered, and adjudged that the plaintiff take nothing by its suit, and that the defendant go hence without day, and recover its costs herein, taxed at $, and that execution issue therefor. Thereupon plaintiff gives notice of motion for a new trial.

85 U. S. circuit court, dist. of Iowa. Oct. term, 1875.

CHARLES T. CROMWELL *vs.* SAC COUNTY. } 1584.

Now comes the plaintiff, and moves the court to set aside the verdict of the jury herein, and for a new trial; and for cause of such motion says: That the said verdict is contrary to the weight of evidence, & that on the said evidence the verdict ought to have been rendered for the plaintiff.

(Sgd) PUTNAM & ROGERS,
Plff's Attys.

(Endorsed:) 1584. U. S. circuit court, district of Iowa. Charles T. Cromwell vs. Sac County. Motion for new trial. Filed Oct. 16th, 1875. George B. Corkhill, clerk.

PUTNAM & ROGERS,
Plff.'s Attys.

86 United States circuit court, district of Iowa, October term, 1875.
Friday, October 29th, 1875.

CHARLES T. CROMWELL *vs.* SAC COUNTY. } No. 1584. Law.

This cause came on this day for hearing on plff.'s motion for a new trial herein, and the court, being fully advised in the matter, denies said motion.

87 Circuit court of the United States, district of Iowa. Oct. T., 1875.

CHARLES T. CROMWELL
vs.
THE COUNTY OF SAC. } No. 1584.

Be it remembered, that on the trial of the above-entitled cause, in the said circuit court, at the October term, A. D. 1875, before the Hon. James M. Love, one of the judges of said court, and a jury, the counsel for the said county of Sac, in order to prove and maintain the issues upon its part, offered in evidence a record of the proceedings and judgment in a certain action in this court, between Samuel C. Smith, plaintiff, and the said county of Sac, defendant, being the same record whereof a true copy marked "Exhibit A" is annexed to the plaint-
88 iff's reply herein, filed May 21st, 1875, and made a part of said reply. To the admission of which said record in evidence the counsel for the plaintiff then & there objected, on the following grounds, to wit:

1st. That the said record does not tend to prove or support the allegations in the defendant's substituted answer herein, or in either division of said answer.

2d. That the judgment of which the record is so offered in evidence does not & cannot by law estop or bar the plaintiff herein from maintaining this action, or constitute any defence thereto, but is wholly irrelevant & incompetent as evidence herein.

Which objection the court overruled & permitted said record to be read in evidence, and it was read accordingly. To which the
89 plaintiff, by his said counsel, then and there excepted.

The counsel for the defendant thereupon further offered to read in evidence testimony tending to prove that in the year 1867, the plaintiff herein was the owner and holder of two of the bonds upon which this suit is brought, to wit, bonds Nos. nine & ten, with the coupons thereon maturing on and after May 1st, 1863, and that one Edward P. Clark was at that time the holder & owner of the other two bonds sued upon herein, to wit, bonds Nos. seven & eight, with the coupons thereon maturing on & after May 1st, 1863; that the said Clark then placed his said bonds and coupons in the hands of the plaintiff for collection; that about the same time one Daniel Ball placed in the hands of the plaintiff, for collection, five coupons, all maturing
90 May 1st, 1862, and severally & respectively cut from bonds Nos. two, three, four, five, and six of the same series, & issue of bonds with those sued upon herein; that the plaintiff, with the consent of the said Clark and Ball, transferred all of the said coupons which had then become due, to wit, all falling due on and prior to May 1st, 1867, to the said Samuel C. Smith, but that the said transfer was not intended to invest said Smith with the real and beneficial ownership of said coupons, but was made solely in order that an action might be brought in the name of said Smith upon said coupons for the purpose of collecting the same for the benefit of the plff. herein, & the parties for whom he held the same for collection; that the plaintiff thereupon caused the said action of Samuel C. Smith vs. Sac County, the record of which
91 was given in evidence as aforesaid, to be commenced & prosecuted upon the said coupons so transferred to said Smith for his own benefit & that of the said parties from whom he received the same for collection.

To the admission of which evidence so offered, the plaintiff's counsel

then & there objected, on the ground that the said evidence tended to contradict the record & findings in the said action of Smith vs. Sac County, and that defendant was estopped by the said record from proving that the said Smith was not in fact the holder & owner of the said coupons. The court overruled the objection & admitted the said evidence, to which the plaintiff's counsel then & there excepted. The defendant having rested its case, the plaintiff's counsel produced & read in evidence the several bonds and coupons upon which this ac-
92 tion is brought, as described, and set forth in the petition herein; and the plaintiff's counsel further introduced evidence tending to prove that plaintiff purchased said bonds Nos. seven & eight, with the coupons thereon herein sued upon, from the said Edward P. Clark, in the year 1873, and shortly before this action was commenced.

And the plaintiff's counsel farther offered to read in evidence the depositions of witnesses examined herein, tending to prove that he, the said plaintiff, purchased the said bonds Nos. nine & ten, and the coupons thereon upon which this action is brought, in the city of New York in March, 1863, and paid full value therefor, without any notice of any defence or equity existing in favor of the county of Sac, against its liability to pay say bonds & coupons, and that he had owned & held
93 said bonds & coupons ever since said purchase, and also that the said Edward P. Clark purchased said bonds Nos. seven & eight, with the coupons thereon herein sued upon, in the city of New York, in the year 1863, for full value paid therefor by him, and without notice of any defence or equity existing against payment of & liability upon said bonds & coupons in favor of said Sac County, and that said Clark continued to own & hold said bonds & coupons until he sold them to the plaintiff.

To all of which evidence so offered, the defendant's counsel objected, on the ground that the plaintiff was barred and stopped by the record & judgment in the said action of Smith vs. Sac County, from proving that he was a holder of said bonds & coupons for value & without
94 notice of defences. Said objection was by the court sustained, and said evidence rejected, to which the plaintiff's counsel then & there excepted.

The evidence and arguments of counsel being closed, the court instructed the jury as follows, to wit:

That the burden was on the defendant to prove by a preponderance of evidence that the plaintiff was the real & beneficial owner of the coupons sued upon in the said action of Smith vs. Sac County, at the time when said action was commenced & prosecuted, and that he presented said suit in Smith's name for his own benefit. That if this was not so proved, they should return a verdict for the plaintiff for the amount due upon the bonds & coupons sued upon. But that if
95 the said facts were proved to their satisfaction, then the plaintiff was barred and estopped by the judgment in said action of Smith from maintaining this action, & they should find a verdict for the defendant.

To so much of said instructions as instructed the jury that under the circumstances therein stated & supposed, the plaintiff would be barred and estopped by the judgment in said action of Smith from maintaining this action, & that in that case a verdict should be *be* returned for defendant, the plaintiff's counsel then and there excepted.

Wherefore, inasmuch as none of the matters and things hereinbefore stated appear of record, the plaintiff, by his counsel, prays the court to

sign & seal this bill of exceptions, which is accordingly done at
96 the term aforesaid, this 16th day of October, A. D. 1875.
(Signed) J. M. LOVE, *Judge.*

(Endorsed:) 1584. Cromwell vs. Sac County. Bill of exceptions. Filed Oct. 29, 1875. George B. Corkhill, clerk. Putnam & Rogers, plff.'s attys.

97 Supreme Court of the United States.

CHARLES T. CROMWELL, PLFF. IN ERROR,
vs.
THE COUNTY OF SAC, DEFT. IN ERROR.

Error to the circuit court of the United States for the district of Iowa.

Now comes the said Charles T. Cromwell, and says that there is error in the judgment and proceedings of the said circuit court in the above-entitled cause, and assigns the following errors therein, to wit:

1st. The court erred in sustaining the defendant's demurrer to the second division of plaintiff's reply.

2nd. The court erred in overruling plaintiff's objection, on the trial, to the admission in evidence of the record in the cause of
98 Samuel C. Smith vs. Sac County, and in admitting said record in evidence, as shown by the bill of exceptions herein.

3d. The court erred in overruling plaintiff's objection to evidence offered by defendant, to prove that said action of Samuel C. Smith vs. Sac County was prosecuted by plaintiff herein for his own benefit, & that he was the real owner of the coupons sued upon therein, & in admitting said evidence, as shown by the bill of exceptions.

4th. The court erred in sustaining defendant's objection to evidence offered by plaintiff to prove that plaintiff was a holder for value of the bonds & coupons sued upon, without notice of any defence thereto,
99 or purchased the same of such a holder, and in excluding said evidence, as shown by the bill of exceptions.

5th. The court erred in instructing the jury to the effect that if they found that the plaintiff was the real holder & owner of the coupons sued upon in said action of Samuel C. Smith vs. Sac County, & prosecuted said action in Smith's name for his own benefit, then he was barred and estopped by the judgment in that action from maintaining this action, & the jury should return a verdict for the defendant, as shown by the bill of exceptions.

6th. The court erred in rendering final judgment for the defendant, for costs.

100 Wherefore the said Charles T. Cromwell prays that the said judgment of said circuit court may be in all things reversed, & that the cause may be remitted to said circuit court for further proceedings, in conformity to the opinion of said Supreme Court.

(Sgd.) JOHN H. ROGERS,
Atty. for Plff. in Error.

(Endorsed:) Chas. T. Cromwell vs. Sac County. Assignment of errors. Filed Sept. 13, 1876. E. R. Mason, clerk. Putnam & Rogers, plff.'s attys.

101 Circuit court of the United States, district of Iowa.

CHARLES T. CROMWELL
vs.
THE COUNTY OF SAC, IN THE STATE OF IOWA. } In error.

Know all men by these presents that we, Charles T. Cromwell, as principal, and Stephen M. Ostrander, of the city of Brooklyn, county of Kings, State of New York, as surety, are held and firmly bound unto the above-named county of Sac in the penal sum of five hundred dollars, to be paid to the said county, & for payment of which we bind ourselves firmly by these presents. Witness our hands this 17th day of November, A. D. 1875.

The condition of this obligation is such, that whereas the above-
102 bounden Charles T. Cromwell has prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of Iowa, now, therefore, if the above-named Charles T. Cromwell shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void, otherwise in full force and effect.

(Sgd) CH. T. CROMWELL,
(") STEPHEN M. OSTRANDER.

CITY, COUNTY, & STATE OF NEW YORK, *ss:*

On this 12th day of November, 1875, personally appeared before me Charles T. Cromwell & Stephen M. Ostrander, to me personally
103 known to be the individuals described in and who executed the foregoing bond, who severally acknowledged that they executed the same freely for the uses and purposes therein mentioned.

[SEAL.] (Sgd) JOHN ALLEN,
Notary Public, N. Y.

STATE OF NEW YORK,
City & County of New York, ss:

Stephen M. Ostrander, being duly sworn, say that I reside in the city of Brooklyn, county of Kings and State of New York, and am worth the sum of one thousand dollars over and above all my liabilities, and have property in the State of New York, liable to execution, to the amount of one thousand dollars.

(Sgd) STEPHEN M. OSTRANDER.

Subscribed & sworn to this 17th day of November, 1875, before me.

104 [SEAL.] (Sgd) JOHN ALLEN,
Notary Public, N. Y.

STATE OF NEW YORK, *ss:*

Charles T. Cromwell, being duly affirmed, saith that I reside in the city of New York, and am worth one hundred thousand dollars over & above all my liabilities, and have property in the State of New York liable to execution to that amount.

(Sgd) CH. T. CROMWELL.

Subscribed & sworn to the 17th day of November, 1875, before me.

[SEAL.] (Sgd) JOHN ALLEN,
Notary Public, N. Y.

Approved.
(Sgd) J. M. LOVE, *Judge.*

(Endorsed:) Charles T. Cromwell vs. Sac County. Error bond. Filed Sep. 13, 1876. E. R. Mason, clerk. Putnam & Rogers, plff.'s attys.

105 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the county of Sac, in the State of Iowa:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the district of Iowa, wherein Charles T. Cromwell is plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable James M. Love, one of the judges of said circuit court, this 22nd day of November, 1875.

J. M. LOVE, *Judge.*

106 Service of within citation & copy of writ of error therein mentioned is hereby admitted.
Sep. 13th, 1876.

GALUSHA PARSONS,
Attys. for Sac County, Deft. in Error.

(Indorsed:) Chas. T. Cromwell vs. Sac County. Citation in error. Filed Sep. 27, 1876. E. R. Mason, clerk. Putnam & Rogers, plff.'s attys.

(Indorsement on cover:) No. 908. Charles T. Cromwell, plaintiff in error, vs. The County of Sac. Iowa C. C. U. S. Filed 1st November, 1876.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1876.

NO. 908.

CHARLES T. CROMWELL, Plff in Error,

VS.

THE COUNTY OF SAC.

ARGUMENT FOR PLAINTIFF IN ERROR,

—BY—

JOHN N. ROGERS,
of Counsel.

PRINTED BY
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DAVENPORT, IOWA.

SUPREME COURT OF THE UNITED STATES.

October Term, 1876.

CHARLES T. CROMWELL,
PLAINTIFF IN ERROR,

vs.

THE COUNTY OF SAC, IOWA,
DEFENDANT IN ERROR.

No. 908.
ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF IOWA.

ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an action on four negotiable bonds and coupons for interest thereon, issued by Sac County in 1860. The only defence set up is that of estoppel by the judgment in a prior action by one Samuel C. Smith against the county, upon certain earlier maturing coupons on the same bonds sued upon herein. Judgment in that action was rendered for the county, and was affirmed on error by this Court. (Smith v. Sac County, 11 Wall. 139.) The defendant's plea in this case alleges that Cromwell, the plaintiff, was the real owner of the coupons sued on in Smith vs. Sac County, and the real plaintiff in that suit. The questions now to be determined are, first, whether the County, having itself put in evidence the record in the Smith case, and relying on it as an estoppel, could be permitted (notwithstanding the special finding upon the issue joined therein as to Smith's ownership of the coupons, that he was owner and holder thereof,) to introduce evidence extrinsic to the record, to prove that they were in fact

owned by Cromwell: and secondly, whether if Cromwell was in fact the owner of said coupons, and the actual plaintiff in the Smith case, he is barred by the judgment therein from maintaining this action.

The Court below ruled in the affirmative on both points; the result of which was a verdict and judgment for the County.

The questions just stated first came before the Court below on a demurrer by defendant to the plaintiff's reply to the second plea. This plea, (record, p. 7) sets up the judgment in the Smith case as a bar, alleging that the present plaintiff was the real plaintiff therein, and that the action was founded on other coupons on the same bonds sued in this action; but does not state the issues nor the findings of fact in the former action. To this the plaintiff replied; (pp. 7–8), 1st, by a general denial of the plea; and 2d, by setting forth at large the record in the Smith case, (of which a copy is annexed to and made part of the reply; record pp. 8–19,) and further alleging facts showing Cromwell to be a holder of the bonds and coupons now sued on, for value, and without notice of any defence thereto.

The record in the Smith case, thus incorporated into the reply, discloses that that action was brought upon twenty-five coupons, including those belonging to the bonds now in suit which matured on and prior to May 1, 1867, but *not* including any sued on in this action.

The bonds were alleged in the petition and purported on their face as therein set forth, to have been issued pursuant to a vote of the people of the county, as provided by a statute of Iowa, for the purpose of building a court-house, and to be signed by the County Judge, and sealed with the county seal. The petition alleged that Smith, the plaintiff, was the holder and owner of the twenty-five coupons sued on, but nothing was alleged as to ownership of the bonds or of the remaining coupons.

The answer in Smith's case, (pp. 15–16), 1st, denied all the allegations of the petition: 2d, alleged that the bonds were issued without authority of law, and that plaintiff took them with notice thereof: 3d, alleged that the County Judge made a contract with one Messervey for the erection of a court-house at the county-seat, for $10,000, and to issue to him the bonds of the county for that amount. That the bonds were issued pursuant to the contract and delivered to the contractor, who failed to build the court-house whereby the consideration of the bonds failed, of which plaintiff had notice when he purchased.

That cause was tried by the Court without a jury, pursuant to stipulation of the parties under the Act of Congress, and a special finding of facts was made substantially as follows:

All the allegations of the petition as to the proceedings authorizing the issue of the bonds, their execution and issue were found to be true (1st to 3d findings, pp 17–18). It was further found that Smith, the plaintiff, was the holder and owner of the coupons in suit, and that they were transferred to him before maturity, and after due record of the proceedings authorizing the bonds, (6th finding, p 18). That the county judge made a contract with one Messervey for the erection of a court house, and in pursuance of such contract delivered the bonds to the contractor. That the county judge, in fact, executed and delivered the bonds at a place outside of Sac county ; that the contractor gave one of the bonds to the county judge as a gratuity as soon as he received them, and that no court house was ever built in pursuance of the contract (4th and 5th findings, p 18).

Fraud in the issue of the bonds was not found, unless it results as mere matter of law from the findings just stated. Nor was there any finding as to whether or not the plaintiff, or those under whom he held, were holders for value.

On these findings judgment was rendered for the defendant.

To the second division of the reply herein (of which this record was made a part), defendant demurred, and its demurrer was sustained (pp. 19–20).

On the subsequent trial of the issues of fact, defendant having put in evidence the record in the Smith case (against objection and exception by plaintiff) was permitted, against plaintiff's objection and exception, to introduce evidence to the effect that in 1867, Cromwell being holder of two of the bonds, now sued on, and the coupons thereon, and one Clark being the holder of the other two bonds sued on and the coupons thereon, and one Ball being the holder of certain past-due coupons cut from other bonds of the same issue, by mutual arrangement all of these coupons then matured were formally transferred to said Smith, and the aforesaid action of Smith vs. Sac county was brought thereon in his name, but under the direction and control of Cromwell, for the benefit of the respective owners of the coupons, as above stated.

Defendant having rested, plaintiff put in evidence the bonds and coupons herein sued upon, and then offered evidence to prove that he and Clark respectively bought the said bonds with the coupons attached, in New York in 1863, before maturity, for value, and without notice of any defence. On defendant's objection, this evidence was excluded and plaintiff excepted.

The Court instructed the jury that if Cromwell was the real owner of the coupons sued in the Smith case, and brought that suit in Smith's name for his own benefit, the judgment in that suit was a bar to this action, and they should find for defendant; to which plaintiff excepted, (bill of exceptions, pp. 22-23).

The jury so found, and judgment for defendant was rendered thereon, upon which plaintiff brings error.

ASSIGNMENT OF ERRORS.

Plaintiff assigns the following errors:

1. In sustaining defendant's demurrer to the reply.

2. In permitting defendants to put in evidence the record in Smith vs. Sac county.

3. In admitting evidence offered by defendant to prove that plaintiff was the real owner of the coupons sued in Smith vs. Sac county, and the real plaintiff in that action.

4. In excluding evidence offered by plaintiff to prove that he was a holder of the bonds and coupons now sued on, for value, and without notice of any defence.

5. In instructing the jury that if plaintiff was the real owner of the coupons sued in Smith vs. Sac county, and the real plaintiff therein, the judgment in that case was a bar to this action.

6. In rendering final judgment for defendant.

ARGUMENT.

The judgment in Smith vs. Sac county, which, it is claimed, bars this action, must be interpreted as to its force and effect as an adjudication, in the light of the opinion of this Court, affirming the judgment, (11 Wall. 146-9). If we correctly understand that opinion, it holds that the judgment is to be supported on the following grounds alone, viz: That the facts stated in the 5th finding showed *fraud* in the original delivery of the bonds; that this cast on the plaintiff the burden of proving affirmatively that he *gave value* for the coupons sued on; that the finding of facts being *silent* on that point, it must be presumed that no such fact was proved, and that hence the plaintiff was not entitled to recover.

It will hence be seen that the county prevailed, in this Court upon a defence not pleaded; and we think we shall not be contradicted in adding, upon a ground quite different from that taken in the Circuit Court, where judgment was given for the defendant upon a defence which had there already prevailed in Lynde vs. Winnebago County, but was afterward held insufficient by this Court in the latter case on error, (16 Wall. 6), viz: the execution and delivery of the bonds by the county judge, while beyond the limits of his county.

As proof of mere want or failure of consideration (the only defence specially pleaded) does not cast on the holder of negotiable paper the burden of proving that he gave value therefor, (Mills vs. Barber, 1 Mees. and W. 425; Knight vs. Pugh, 4 Watts and Serg. 445; Fitch vs. Jones, 5 Ell. and Bl. 238), and as under the Iowa code governing the practice in the court below, special defences cannot be proved under an answer merely in denial of the petition, (Revision of 1860, Secs. 2942-4.) there was nothing on the record to advise the plaintiff that he must be prepared on the trial to prove that he or those under whom he claimed were holders for value. He failed, as it seems to us, through sheer misadventure; the evidence chiefly relied on in this court as showing fraud not having been formally offered for that purpose, but coming out incidentally during the trial. And with regard to the decision in this court, while it would ill become us to suggest that it was wrong, we hope to be pardoned for saying, with much deference, that we have never been able to see how one point was gotten over, viz: that the facts stated in the special finding did not show fraud, as matter of mere legal inference, but only evidence tending to show fraud, and from which a court or jury might (or might not) find it as matter of fact.

The case, however, was so adjudged, and the judgment doubtless has the effect to conclude forever the right of recovery on the $2,500 of coupons then in suit.

But when it is sought to make it the instrument, by estoppel, of converting into waste paper other securities to a much larger amount, which we are now prepared to prove by incontestable evidence that we purchased in good faith, and for full value—proof which, if admissible, will entirely rebut the defence which prevailed in the former case—we respectfully, but earnestly ask the Court to examine carefully before holding that the inexorable rules of law leave no escape from such a result.

I.

We regard the questions arising on the demurrer, as to all intents and purposes the same as those raised by the exceptions taken at the trial. And the question which comes first in the logical order is the following, viz:

Was it competent for the defendant, having itself pleaded and put in evidence the record in the Smith case as an estoppel against the plaintiff, to contradict, by extrinsic parol evidence, the express finding in that case, that Smith was the holder and owner of the coupons then in suit? This the defendant was permitted to do against our objection and exception, for the purpose of connecting the present plaintiff with that case. We submit that this was error.

Smith's ownership of the coupons was directly in issue in the former action, being expressly alleged in the petition, and denied, (in common with the residue of the petition,) in the answer. It was a *material* issue, and involved the actual and beneficial, and not the mere nominal and colorable title. The Iowa Code, under which the action was brought and tried, provides that "Every action must be prosecuted in the name of the real party in interest," (Rev. of 1860, Sec. 2757), with some exceptions having no application to this case. Under this statute if the plaintiff is a mere nominal party, in whose name the action is brought for the benefit of some one else, that alone is a sufficient defence. And

on an issue like that joined in Smith vs. Sac County, upon the plaintiff's ownership of the instruments sued on, the defendant would certainly be entitled to prove that though a formal transfer had been made to plaintiff, it was for the mere purpose of bringing suit in his name, for the sole benefit of another party, and such proof would entitle defendant to a verdict. When therefore the Court found that Smith was the holder and *owner* of the coupons, it necessarily found that he was the *real* and *beneficial* owner.

Swift vs. Ellsworth, 10 Ind. 205.
Carpenter vs. Miles, 17 B. Monr. 598.

Some contrariety of decision exists as to whether, under such a statute as that just cited, an action can be maintained in the name of a holder of negotiable paper, who holds it under an obligation to account to another for the amount collected thereon in whole or in part: but it is believed that no case sustains the action, where the plaintiff has simply lent the use of his name, without having any right to control the suit, or to receive the avails of the judgment. Yet this is substantially what the defendant was allowed to prove to have been Smith's relation to the former suit. It was thus allowed to introduce and claim the benefit of the adjudication in that case, so far as it enured to its benefit, and to repudiate and contradict it, as to facts found in favor of the opposite party. This is contrary to the rule that estoppels are mutual. A party who relies on a verdict and judgment as an estoppel in his favor, must take them as an entirety. He cannot split the verdict in two, and reject so much as is unfavorable to himself. It is emphatically the findings, and not the mere judgment in the Smith case, upon which the defendant must rely for its estoppel here; for the mere fact that the plaintiff failed in a prior action on other coupons, without reference to the *grounds* on which he was defeated, can never constitute a bar to the present suit, founded wholly on different instruments. And we insist

that, relying on the finding, they must abide by it, and by the whole of it.

II.

Supposing, however, the evidence to connect the present plaintiff with the Smith case to have been properly admitted, and regarding that case as though Cromwell had been plaintiff on the record; we are brought directly to the vital question, does that judgment estop him in this action, at all; and if so, to what extent?

At the outset of the discussion on this head, it will be well to call special attention to the difference (already incidentally alluded to) between the effect of a judgment as a *bar* to another action upon the *same claim or demand*, and its effect as an *estoppel*, in another suit between the same parties upon a *different* claim or cause of action. In the former case, it is wholly immaterial on what grounds the judgment was based, provided only it was on the merits. In that case it constitutes an absolute bar to a second action for the same cause. This is for the plain reason expressed in the maxim, "*Nemo debet bis vexari pro eadem causa.*" Were it otherwise, there would be no end to litigation.

But when the second suit is upon a distinct claim or cause of action, the mere *judgment* in the former case cannot bar or estop the parties in the second. It must then appear that some particular *issue* arising in the second action was tried and determined in the first; and the estoppel extends only to such issues, and is not necessarily decisive of the whole case. It is not, in such case, the judgment, but rather the verdict or finding of facts, constituting the *basis* of the judgment, by which the parties are estopped.

Authorities are hardly needed for propositions so elementary as those just stated. We will simply refer to the luminous judg-

ment of Lord Ellenborough in Outram vs. Morewood, 3 East. 346, which has ever since been a landmark in the law of estoppel by record; also to Bigelow on Estoppel, pp. 25 *et seq.*, 35 *et seq.*, where the two species of estoppel by former adjudication are classified and discussed separately.

A moment's reflection will show that the estoppel (if any) in this case belongs to the *second* class, and depends not on the mere *judgment* in the Smith case, but upon the issues therein determined. Plainly, the mere fact that plaintiff had before sued on other coupons belonging to these same bonds, and had judgment against him, constitutes no bar to his recovery upon the instruments now sued on, since the former judgment might have been rendered on a defence applicable only to that case, e. g. payment, accord and satisfaction, release, or the statute of limitations. Defendant must go farther, and show that some defence was established, which necessarily applies to this action. He is not relieved from this burden by the fact that the instruments sued on in both actions were originally executed and issued by the county in the same transaction. It is enough that they constitute distinct demands, capable of being separately sued, and that the holder might be entitled to recover on part of them without being so entitled as to the residue. It frequently happens in cases giving rise to an estoppel by the determination of issues in a former suit, that the two causes of action are thus connected in their origin; e. g., two notes given for instalments of the price, in a contract of purchase, (Gardner v. Buckbee, 3 Cow. 120); two custom house bonds given for duties on the same importation (Bouchaud v. Dias, 3 Den. 238); different instalments of rent under the same lease (Howlett v. Tarte, 10 C. B. (N. S.) 813), and different coupons on the same bonds (Whitaker v. Johnson county, 12 Iowa 595). In neither of these cases was it suggested that the mere judgment in the first suit, without regard to the grounds of it, created an estoppel in the second.

As we have seen, the defence which prevailed in the Smith case was fraud in the delivery of the bonds, coupled with want of proof that plaintiff was a holder for value. *Both* elements, the fraud and the absence of value paid, were essential to the defence in that case, and equally so in this; though proof of the fraud might raise a presumption that no value had been given, and cast the burden of proof on the plaintiff. The court below has held us estopped on both points, and unless this was right, the judgment must be reversed. If we are estopped only on the question of fraud, then the court erred in sustaining the demurrer to our reply, which alleged the plaintiff to be a holder for value of the instruments now sued on, and also erred in excluding our evidence to prove this on the trial. *A fortiori*, if we are estopped on *neither* point, the defence fails *in toto*.

1. Is plaintiff estopped on the question of fraud in the delivery of the bonds? We submit that he is not, for the following reasons:

In order that a verdict and judgment thereon may conclusively establish any specific affirmative fact in a subsequent suit between the parties, that fact must have been *in issue* in the former action. To this effect the authorities, it is believed, are uniform. There has been some difference of opinion whether, when the form of the issue is general, not disclosing the particular points on which the case actually turned, parol evidence is admissible to show this. The weight of authority is, perhaps, on the affirmative side. But it has always been held incompetent to show by evidence extrinsic to the record, that questions were in fact tried which were not embraced within the issues, general or special, joined on the record, (Campbell v. Butts, 3 N. Y. 173; Manny v. Harris, 2 Johns 24; 2 Smith's Lead. Cas. (marg.) 672 and cases cited). A general verdict simply responds to the issues joined on the record. Though in fact other issues, not within the scope of those appearing on the record, may have been tried and the case have

turned upon them, parol evidence is inadmissible afterwards to prove this, so as to make the verdict an estoppel on such issues. As we have already seen, the defence of fraud was not within the issues joined in the Smith case. The finding, however, is special, and states facts which this court seems to have held to amount to fraud, and to warrant a judgment for defendant *in that case*, though not pleaded. The reasons for this are not stated in the opinion, but probably it was thought that plaintiff must be presumed to have waived any objection to the defence, as not pleaded; or else, that in giving judgment on special verdict, the pleadings are not to be looked into. But does it follow, because effect was given to this finding as a basis for judgment in that case, that it must have the same virtue by way of estoppel in this case as though found on an issue regularly joined? We submit not. The rule ought to be the same, whether the verdict be general or special. The form of the findings being discretionary with the court or jury trying the case, the rights of the parties ought not to be varied thereby. It has several times been held that even an agreement between the parties to submit to the jury questions foreign to the issues joined on the record, or an instruction by the court to the jury to consider such questions, will not enlarge the operation of the judgment as an estoppel.

Guest v. Warren, 9 Exch. 379.
Campbell v. Consalus, 25 N. Y. 613, (616).

In the last named case, a referee's report in a suit to procure the cancellation of a mortgage as paid, finding that it was not paid, but that a specific sum was due thereon, followed by a judgment dismissing the complaint, was held not to estop the mortgagee in a subsequent suit to foreclose the mortgage, as to the amount due. This was so held because the issue was limited to the fact whether the mortgage had been paid or not. It was further held that the effect of the adjudication was not enlarged by the fact that the case was tried under a stipulation that it might be decided upon principles of equity without regard to technical rules or the form

of the pleadings. Such an agreement, it appears, will be confined in its operation to the particular case, and will not enlarge the effect of the judgment as an estoppel. And this is equitable and in accord with the intentions of the parties, who rarely consider the future effect of the judgment as an estoppel. A decision similar in principle was made in Lewis & al's Appeal, 67 Penn. St. 153. And see also 2 Smith's Lead. Cas. (marg.) 672 and cases there cited.

III.

But even supposing the findings in the Smith case to conclusively establish against plaintiff in this action, that the bonds were fraudulently delivered, this would go no further towards making out a defence, than original evidence establishing the same fact. It could be met and avoided by proof that plaintiff was a holder for value. But the Court below held us estopped on this point also, and excluded our proof. We submit with confidence, (whatever may be held on the other points,) that this was error. This point rests on quite different grounds from any of the others: and we respectfully ask the Court's careful consideration of it.

1st. The Smith case does not estop us from proving that we are holders for value of the instruments now sued on, which do not include any in suit in that case, because *there was no finding whatever on the question, whether the plaintiff or those under whom he claimed were holders for value.* The findings are entirely silent on the point: and the judgment of this Court was put upon the ground, not that it was found that plaintiff was not a holder for value, but that it was *not* found affirmatively that he *was.* It was argued for the plaintiff that the rule casting on him the burden of proving that he gave value, was a rule of *evidence* merely, to guide the Court and jury in making up the verdict, and could not supply the place of a *finding* whether or

not the plaintiff purchased for value: and that hence the finding was in this respect defective, and could not be made the basis of a judgment. (See 11 Wall. 143—5.) This view did not prevail; but it is submitted that, clearly, the *effect* of the judgment for defendant on such a finding, is no other or greater than that of a nonsuit on the trial for lack of evidence of some fact which was essential to the plaintiff's case; as was said in Smith vs. McCool, 16 Wall. 562 of the judgment in the former action between the parties.

Such a judgment cannot operate to estop the plaintiff from proving the fact, for want of proof of which he thus failed, in a subsequent action upon another demand.

It will be contended by our opponents, however, that a rule has been established in this Court, in Beloit vs. Morgan, 7 Wall. 619, and Aurora City vs. West, ib. 82, which gives to the findings and judgment in the Smith case the same effect as an estoppel, on the question whether plaintiff was a holder for value, as though it had been expressly found that he was not such a holder. It is said that as he then had the opportunity, and was called upon, to show, if he could, that he had given value for the coupons, his default in doing so debars him from alleging or proving the fact in another action, though founded on other bonds and coupons than those then in suit.

The learned justice of this Court who ruled upon the demurrer in this case, was understood to sustain it (with some reluctance), wholly in deference to the two cases in 7 Wallace.

We hope to be excused for suggesting the inquiry, notwithstanding the cases in 7 Wallace, whether any such rule exists; and whether the broad doctrine laid down in Beloit vs. Morgan, that a judgment is conclusive upon the parties, in another action on a distinct demand, upon every question of fact which *might*

have been litigated and determined in the case, though not actually litigated and determined, can be supported.

It doubtless requires some boldness to argue in this Court against a proposition of law to which the Court has once given its sanction. Instances however, are not wanting, though rare, in which even this high tribunal has been induced to reconsider and overrule its former decisions. A recent example occurs in Hornbuckle vs. Toombs, 18 Wall. 648, in which two quite late concurring decisions in regard to equity practice in the territorial courts were reconsidered and overruled, though the rule of *stare decisis* was invoked by counsel in the most emphatic terms. We are encouraged by this to ask for a re-examination of the doctrine asserted in Beloit vs. Morgan: and we hope to show that that doctrine is unsupported by any other decision: that the point has been decided exactly the other way, by at least ~~five~~ six highly respectable courts; and that on principle the rule ought to be otherwise.

We say, firstly, that on a careful investigation of the authorities, English and American, we have found no decision sustaining Beloit vs. Morgan, in the length to which it goes. The companion case of Aurora City vs. West, in the same volume, does not appear to go so far: although we have not been able to ascertain from the report, quite how far it does, or was meant to go. In the opinion, (page 103.) it is said that the "better opinion is, that the estoppel, when the judgment was rendered upon the merits, whether on demurrer, agreed statement or verdict, extends to every material allegation or statement, which, having been made on one side and denied on the other, *was at issue in the cause, and was determined in the course of the proceedings.*"

To the rule thus stated, no possible exception can justly be taken. It accords with the authorities generally, and with text-writers on the subject. (See 2 Smith's Lead. Cas. (6th Am. Ed.) pp. 665, 787, 791, and cases cited; Bigelow on Estoppel, p. 45.)

Beloit vs. Morgan goes far beyond this, and holds that in an action on coupons, the defendant is estopped from setting up a defence impeaching the validity of the bonds, by a former judgment against it in favor of the same plaintiff, on *other* coupons from the same bonds, whether the defence in question was set up in the former action or not.

In Howlett vs. Tarte, 10 C. B. (N. S.) 813; 100 Eng. Com. Law Rep. 813,) the English Common Pleas held the exact opposite. The action was for rent under a building agreement. Defendant pleaded a subsequent agreement converting the tenancy into one from year and year, and determination thereof by notice to quit, *before* the time for which the rent sued for was alleged to have accrued. Plaintiff replied a judgment in his favor in a former action against the defendant for rent under the same agreement, which accrued *after* the date at which the tenancy was alleged to have been determined; in which action, defendant did not set up the defence pleaded in the second action. On demurrer, after full argument, the replication was held bad.

In delivering judgment, Willes, J. said, (p. 827,) "Nobody ever heard of a defendant being precluded from setting up a defence in a second action, because he did not avail himself of the opportunity of setting it up in the first action. Mr. Dowdeswell" (plaintiff's counsel) "has been unable to find an authority for such a proposition, and I have only found one case where it has been distinctly raised," (referring to an ancient case in Rolle's Abr.) "I think we should do wrong to favor the introduction of this new device into the law."

Byles, J. said, "It is plain that there is no authority for saying that the defendant is precluded from setting up this defence."

Keating, J. said, "This is an attempt on the part of the plaintiff to extend the doctrine of estoppel far beyond what any of the authorities warrant."

In Carter *v.* James, 13 Mees. & Wels. 137, in debt on a mortgage covenanting for payment of £600, defendant pleaded in bar the judgment in a former action by plaintiff against him on a bond conditioned for the payment of the same sum of £600. In the former action defendant had pleaded a usurious agreement, and that the bond was executed in *pursuance of such agreement.* The plaintiff had replied traversing that the bond was executed in pursuance of the usurious agreement, which issue was found for defendant and judgment rendered in his favor. On demurrer to the plea in the second action, this judgment was held no bar; upon the ground that the alleged usurious agreement itself not having been put in issue in the former suit, plaintiff was not estopped from denying it in the second suit.

Alderson, B. after pointing out that in the former action no issue was taken on the *making of* the usurious agreement itself, said: "If, therefore, the plaintiff were to be deemed estopped now, when the point in issue was not raised at all in the former suit, he would be deemed estopped by the finding of a matter which he never disputed, and on which the jury gave no verdict and the court no judgment. I take it that the party is only estopped by the form of the record in that action from *recovering on the bond*, or disputing that *any of the issues then determined by the jury were wrongfully decided.*"

In Hooker v. Hubbard, 102 Mass. 239 (245), the defendant in an action on a promissory note having set up the defence that another note had been given and accepted in renewal thereof, and having prevailed on that defence, was held not estopped, in a subsequent action by same plaintiff against him on the renewal note, from setting up failure or want of consideration for the original note. It is said by the court (p. 245), "Estoppels of this description are attended with qualifications which must be strictly observed. They are conclusive only as to the facts which were directly put in issue and determined in the former suit."

In Hughes v. Alexander, 5 Duer. 488, it was held that the defendant, in an action on a promissory note, was not estopped from pleading that the note was given in pursuance of an illegal contract, by a judgment by default against him in a former action by the same plaintiff on another note, given in the same transaction and open to the same defence.

In Van Alstyne v. R. R. Co., 34 Barb. 28, plaintiff sued to recover for his services under a contract of hiring, and the defence was that the contract had been put an end to before the time for which plaintiff claimed to recover. *Held*, that defendant was not estopped from setting up this defence by a judgment against it, by default, in a former action by plaintiff for services under the same contract, for a period of time subsequent to the alleged termination of the contract.*

These ~~five~~ six cases, decided in as many different courts, are all diametrically opposed to the doctrine laid down in Beloit v. Morgan. It seems also to be inconsistent with the prior decisions of this court, in Packet Co. v. Sickles, 24 How. 333, and 5 Wall. 580, and is certainly in direct conflict with the rule laid down by Nelson, J. delivering the court's opinion in the last named case, 5 Wall. p. 592. As already said, no decisions have been found sustaining it, although there are some dicta, which if read without reference to the facts in the cases where they occur, seem to give it some countenance. Perhaps the most noteworthy of these is found in Le Guen v. Gouverneur, 1 Johns. Cas. 436, where it is said by Radcliff, J. (p. 492) that a judgment of a court of competent jurisdiction is final, not only as to the subject matter thereby determined, "but as to every other matter which the parties might litigate in the cause, and which they might have had decided." On looking into the case itself, however, it appears to have been a suit in chancery for relief against a judgment at law, on the ground of fraudulent representations inducing the contract on which the judgment was obtained, which

* A precisely similar decision was made in Bernard v. City of Hoboken, 3 Dutch. (N. J.) 412.

fraud, if it existed, was known to the complainants in time to set it up in the action at law, and would have constituted a good defence therein. The point, therefore, really adjudged was that equity will not give relief against a judgment at law, on grounds of which the party might have availed himself in the action at law, but neglected to do so. This decision we regard as in strict harmony with the views herein advocated. It will be noticed that both the action at law and the suit in equity related directly to the *same identical claim or demand, not* to different ones in respect to which the same issue arose. The language of the learned judge, quoted above, is to be interpreted in view of the case before him, and so explained it does not mean to affirm any such extensive proposition as that a judgment in an action in which a particular issue *might have been* determined had the parties chosen to raise it, will constitute an estoppel upon *that issue* whenever it afterwards arises between the same parties, though in a suit upon a different cause of action. It may be added that the authorities cited by Judge Radcliff in support of his proposition will be found to go no farther than the case actually before him.

On principle, it is difficult to see why the reasons, whether relating to public or private interests, which lie at the basis of the doctrine of *res adjudicata*, are not satisfied by treating a judgment as conclusive, 1st, of the particular *claim* on which it is founded, and 2d, of all *issues* actually raised and detetmined in the action. Parties are influenced in defending or prosecuting suits, by various considerations, other than the actual merits of the case. The amount of the claim in controversy, the difficulty or expense of establishing or defending it, the extent of the party's knowledge or information about the facts, his situation and circumstances at the time, all go to determine his course in the particular suit. A defendant may, on the whole, prefer to let judgment go against him by default, when sued for an instalment of interest, in view of his situation at the time, rather than

to litigate the claim. Why should this estop him from defending, when sued for the principal, any more than a voluntary payment, without judgment?

We respectfully submit, however, that it is a sufficient objection to the doctrine of Beloit vs. Morgan, that it goes a long step beyond any other well considered decision, English or American, and that in the language of Willes, J. in Howlett vs. Tarte, *ubi supra*, it "introduces a new device into the law." The law of estoppel is *stricti juris*, and peculiarly dependent on common law authority. Formerly the plea of estoppel was looked on with marked disfavor. Of late years there appears to be rather a tendency to go to the other extreme. In a middle course, in this as in many other matters, we submit that the path of safety and of justice lies.

IV.

But giving to the judgment in the Smith case its greatest possible effect as an estoppel, even under the doctrine held in Beloit vs. Morgan, it falls short of concluding us in this case, on the question of value paid, for a reason now to be stated,—a reason upon which we believe we can firmly stand, though every other point be decided against us.

All that under any view, was in question or determined in the Smith case, as to the character of the plaintiff's ownership, *was limited to the 25 coupons then in suit.* Nothing was alleged, nor needful to be alleged or proved as to ownership of the bonds themselves, or of any of the other coupons belonging to them.

Further than this, there is no necessary connection between ownership of those coupons then in suit, and ownership of the bonds and coupons now in suit. Each coupon is a separate negotiable instrument, capable of being detached and negotiated separately from the bond, and separately from its fellow coupons. This has been repeatedly ruled in this Court. One man may

become the holder of certain coupons cut from a bond, another of certain other coupons from the same bond, a third of the bond itself; and all under different circumstances as to value paid therefor, or notice of defences. And the same man may purchase or acquire these several securities at different times and under different circumstances; so that as to part, he may be able to show that he is a holder for value, and without notice of defences, and not as to the residue. In this respect, this part of the case differs from matters affecting the bonds themselves in their inception, and necessarily applying to all, if to any; such as invalidity or fraud in the entire issue. Such matters established as to one bond or coupon, are necessarily established as to all; and such was the character of the defences which in Beloit vs. Morgan, the town was held estopped to set up, by the former judgment against it. But it is plain, in view of what has just been pointed out, that a judgment against the plaintiff in an action on specific coupons only, upon a defence in which it is an essential element that the plaintiff is not a holder for value, or that he took with notice, can never by its own mere force or virtue, create an estoppel against him *on these points*, in an action on other coupons or the bonds themselves.

The defendant's counsel seeing this difficulty, have endeavored to avoid it by alleging in their plea, that as matter of fact, the coupons sued in the Smith case were attached to the bonds when the latter came into plaintiff's hands, so that his title to the bonds and to the coupons are one and the same. And it is claimed that this extrinsic averment, and proof there of, bring the present action within the grasp of the estoppel. But we submit, with confidence, that the estoppel cannot be extended by any such extrinsic and fortuitous fact. Grant that as matter of circumstance in this particular case, the same evidence on which plaintiff would rely to prove that he is a holder for value of the bonds and coupons involved in this action, would also tend to prove that he so held the coupons on which the Smith

action was founded. This connection in the evidence does not inhere in the necessity of the case. It is, so to speak, fortuitous and accidental, in this particular case. It is not material, in either action, to prove that the plaintiff is a holder for value of any bonds or coupons, save those in suit in the cause on trial. That the same evidence *happens* to prove the same state of facts as to other instruments, is an extraneous circumstance, which cannot enlarge the operation of the judgment, so as to make it take in those other securities. To hold otherwise would violate one of the cardinal rules laid down in the opinion of De Grey, C. J. in the Duchess of Kingston's case, which has ever since been treated as a canon in the law of estoppel, viz: that a judgment is not evidence "of any matter which came *collaterally* in question, nor of any matter *incidentally* cognizable, nor of any matter to be *inferred by argument* from the judgment."

So it was held in a case identical in principle with the present case, Mersereau v. Pearsall, 19 N. Y. 108, to which we ask the special attention of the Court. That was an action for damages for building a dam and setting back the water on the wheel of plaintiff's saw mill. In order to make out his case, plaintiff on the trial relied entirely on a judgment recovered by him in a previous similar action against defendant, in which it was found as matter of fact that the defendant's same dam did set the water back upon the wheel of plaintiff's saw mill, to his damage. To rebut this by way of counter estoppel (which, according to Coke, "setteth the matter at large,") defendant relied on a judgment in his favor in a second and later action by the plaintiff and his father against the defendant for setting back the water by means of the same dam, upon the wheels of a grist mill owned by them, in which action it was found as a fact that defendant's dam did not set back water on the wheels of the *grist*-mill. Defendant further proved that both the mills were supplied with water from the same dam, and that their wheels were upon the same level, and were necessarily equally affected by backwater from defend-

ant's dam. It was held that this second judgment could not avail the defendant as a defence. Johnson, C. J., delivering the opinion, says, (after adverting to the fact of the two mills being on the same level, and equally affected by defendant's dam,) "It will be observed that these last mentioned facts, admitted for the purposes of the trial, *are no part of the adjudication in the second suit.* The question there related solely to the water set back on the wheel of the grist-mill. What the relative level of the two wheels was, or their being equally or unequally affected, was not in controversy and could not be litigated in that suit.

* * * * * * * *

"The situation of the parties, then, is this: the plaintiff has an adjudication in his favor in a suit against the defendant, in which the precise question now in controversy, in respect to his saw-mill wheel, was litigated. The defendant has at most an adjudication in which the plaintiff and another were plaintiffs, not upon the precise point now in controversy, but upon the fact as to flooding the grist-mill wheel, which *by argument founded on the admission of facts not adjudicated*, he insists demonstrates that the two questions ought to have been decided in the same way. This does not present a case of adjudication against adjudication, but only of an adjudication one way and *a probable argument*, founded on another adjudication of a distinct question the other way. It leaves the effect of the first judgment untouched."

It seems obvious that the ruling in this case that the judgment in the action relative to the grist-mill was not an adjudication in favor of defendant of the point in controversy in an action for injury to the saw-mill, would and must have been the same, if the plaintiff had relied, not upon a *judgment* in his favor, but upon original evidence that defendant's dam set back the water on the saw-mill. We submit that the decision itself, and the reasoning of the court are directly in point in our favor in this

case. Here, also, the extrinsic fact relied on that plaintiff purchased the bonds now sued on, along with the coupons sued in Smith's action "is no part of the adjudication" in that action, "and was not in controversy and could not be litigated in that suit." And the defendant relies on an adjudication "not upon the precise point now in controversy," (viz: whether plaintiff holds the securities now sued on for value paid therefor) but at most upon the fact as to whether he so held the coupons before sued on, "which by argument founded on the admission of facts not adjudicated, he insists demonstrates that the two questions" *must be* "decided in the same way."

It is worthy of remark that Mersereau v. Pearsall was decided in a state whose courts have gone as far as any in admitting parol evidence to show what particular issues were litigated and determined, when this does not appear from the record.

Many cases might be cited in which the rule that a judgment is conclusive of nothing deducible from it by inference or argument, however irrefutable, has been applied and carried to great length. Thus, in Spooner v. Davis, 7 Pick. 147, it was held that a verdict in a former action, finding that a grantee had notice of a former deed to another party, did not estop him from denying the execution of the former deed. Carter v. James, 13 Mees. & Wels. 137, and Campbell v. Consalus, 25 N. Y. 613, already cited on other points, are also strong cases of the same kind. And in King v. Chase, 15 N. H. 9, in a powerful opinion by Ch. J. Parker, it is maintained that a verdict and judgment are never conclusive in another action upon matters which came in controversy on the *evidence* merely, and did not *in themselves* constitute the main question to be decided, however decisive of the case such questions may have in fact been. It was accordingly held that where in an action of trover, the issue had been on the plaintiff's title to the property, and this on the trial had in fact turned on the question whether a mortgage, under which he

claimed, was fraudulent, the verdict and judgment for defendant did not create an estoppel between the parties on the validity of the mortgage, in another action in which that question arose. See also Hibshman v. Duleban, 4 Watts. 183; Lentz v. Wallace, 17 Penn. St. 412; Ihmsen v. Ormsby, 32 Penn. St. 198; Tams v. Lewis, 42 ib. 402. Moulton v. Libby, 15 N. H. 480.

There is doubtless much contrariety in the decisions as to how far a judgment is conclusive upon matters which came in controversy only upon the evidence, but which were in fact decisive of the case. But it is believed that no case goes so far as to hold (what the defence in this case requires) that a judgment can conclude the parties as to a fact not litigated in the case and not material to it, *merely* because it so happens as a circumstance in the particular case, and not from any inherent necessity, that the *same evidence* which would have to be relied on to establish that fact would also prove another fact in issue in the former case.

Many cases of such a fortuitous connection in the *evidence* of different facts may be supposed. Take, for example, a case which recently occurred in the county of the writer's residence. By a gun-shot fired through the window of a dwelling-house from the outside, two persons are killed. Separate indictments are found against an individual for the murder of each of the persons killed. On the trial of either of these indictments the sole question of fact litigated is whether the fatal shot was fired by the defendant. If he is guilty under the one indictment, it logically follows that he is guilty under the other, and *vice versa*. But it is believed that no court would venture to hold that an acquittal on one could be successfully set up as a bar to the other, though accompanied with averment and proof of the intimate connection between the cases as above supposed. See State v. Standifer, 5 Porter (Ala.) 223. New and material evidence might be discovered after the first trial which would morally as well as legally justify putting the defendant on trial on the other charge.

Again, suppose in trover or replevin for a colt, the title is put in issue and there is a verdict and judgment for defendant. If the same plaintiff afterwards sues the same defendant in trover for a mare, could the former judgment be made to operate as a bar to the action or an estoppel on the question of title, by averment and proof that the colt was the offspring of the mare, and was *en ventre sa mere* when the latter came into defendant's possession? We apprehend not, however forcible the *argument* might be that both cases should be decided alike.

It should be borne in mind that there is neither averment nor evidence that the common title to the bonds now in suit and the coupons sued in the Smith action, which the plaintiff is now alleged to have in fact, was actually given in evidence and passed upon by the court in that case.# Defendant now relies on the record alone, as evidence of what was before adjudicated, and no question was submitted by the court to the jury save that as to Cromwell's relation to the Smith case, and they were instructed that if he was the real and beneficial plaintiff therein, the judgment was an absolute bar to this action. It was therefore in effect held that we are estopped, not upon a matter which *in fact* arose and came in question, though collaterally and incidentally, and on the evidence alone, but upon a matter which it is argued, *might*, *could*, *would* or *should* have so come in question. We confidently affirm that no case can be found giving any manner of countenance to this position.

Great force is further added to this branch of the argument, when it is considered, that no finding was in fact made in Smith's case, that he was not a holder for value of the coupons then in suit; that that is to be regarded as settled by the judgment in that case, if at all, only by the application of the doctrine in Beloit vs. Morgan, which concludes parties on points which they *might* have established in a former suit, but failed to do so. The judgment against us, on this point, having been in effect by de-

And the replication alleges that it was not in fact adjudicated whether Plff. was a holder for value of the bonds & coupons now sued on. (Record, p. 8; many p.

fault, there is all the more reason for confining it strictly to the point then material to be shown, and not extending it by inference or argument to anything beyond.

If either of the points we have argued is well taken, it suffices to reverse the judgment below. That the plaintiff has merits, if he is not debarred from showing them, is inferable from the fact that defendant has chosen to withdraw all defences except that of estoppel. It is submitted that this defence cannot prevail, to the extent given it by the Court below.

REPLY TO ARGUMENT FOR DEFENDANT.

The peculiar method adopted by the learned counsel for defendant, in his *running* commentary on the foregoing argument, of picking out here and there, seemingly at random, disjointed and fragmentary sentences (not always correctly quoted), and making them the texts for his observations, instead of replying to the *points* we have argued, we think has not tended to clearness. Though written *currente calamo*, (see p. 5) the result is scarcely such as he that *runs* may *read*, understandingly. The connection between the text and the discourse is not always quite apparent. This is not favorable to an intelligent reply. Much that is said by the learned counsel, will therefore be passed over without comment.

1. The counsel is incorrect in stating (p. 2 at foot, and again in substance p. 6 at foot), that on the trial plaintiff offered to show that he purchased the bonds, with the coupons attached, in March, 1863, *including all the coupons described in the petition in the former action as belonging to these bonds.* The offer was, in fact, confined to the bonds and coupons *now in suit*, (record, p. 23; marg. p. 92, 93). This is followed (p. 3) by the statement

t' at "the petition in the former action alleged just what is here offered," (*i. e.* stated to have been offered,) "as to the plaintiff's purchase." This is a more material error. The petition in the Smith action alleged nothing, nor did the Court find anything about either purchase or ownership of anything except the specific coupons then sued on; as hereinbefore stated, p. 4 at foot. (See Record, pp. 12–15). The bearing of this is shown under the fourth head of the foregoing argument.

2. The alleged defect in our assignments of error, though repeatedly referred to, is not pointed out, and we are at a loss to conjecture in what it consists. In framing them, the statute and rule of court were had in mind, and effort was made in good faith to comply with them fully; (Record, p. 24) and it is believed not without success.

3. It seems to be claimed (p. 4) that the two cases in 7 Wall. together with one in 1 Otto, are decisive in defendant's favor, of the whole case, and every question in it. These cases, and our defective assignment of errors, constitute the counsel's main-stay and chief reliance, and render it questionable in his mind whether he ought even "to *run over* the argument on the other side." This is hardly a candid treatment of the case. The learned counsel no where undertakes to show how the cases referred to furnish any answer to the points urged for the plaintiff other than that point, (3d) under which we have discussed them. We are unable to see that they are pertinent to any other.

Gould v. Evansville &c. R. R. Co., 1 Otto 526, decides nothing on any point now in question. There is a passing remark by the learned judge who delivered the opinion, (p. 533) that, "Except in special cases, the plea of *res adjudicata* applies not only to points upon which the Court was actually required to form an opinion and pronounce judgment, but to every point which prop-

erly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time;"—a remark strictly correct as applied to the case then before the Court, and to most others in which similar expressions may be found; both actions having been brought upon the same judgment.

4. The criticisms on the replication, (p. 5, at foot) are groundless. The defendant's plea omitted to state (as it ought to have done) the issues and findings in the Smith case. The replication sets out the record in that case in full, for the purpose of showing to the Court precisely *what* matters were adjudicated therein; and further alleges that plaintiff is in fact a holder in good faith and for value of the instruments now sued on, which is strictly new matter. If the record in the Smith case does not estop us on that question, even though it does on others, the replication is certainly good. But whether it is good or bad depends on its merits, and not on any technical or formal objection. Such objections are not grounds of demurrer, under the Iowa Code, and were not assigned as such by defendant.

Nor was any error in sustaining the demurrer waived by going to trial on the other issue. Where a party, being entitled to do so, pleads or replies doubly, he is entitled to the benefit of both his pleadings, and is not obliged, at any stage of the cause, to elect between them. It is not like the case of amending, or pleading over *de novo*, after a demurrer sustained.

5. There was no such vague issue joined in the Smith action as "whether the bonds were valid or invalid," as said by the learned counsel, (p. 8). A plea alleging simply that the bonds "were invalid," would amount to nothing if pleaded, which it was not. The findings of the Court do not sustain any one of the defences actually pleaded; and it is vain to contend that the de-

fence of fraud in the delivery of the bonds was fairly embraced in the issues.

What was said, (p. 8 *ante*,) was in substance that "there was nothing in the record to advise the plaintiff" in the Smith case, that the *burden of proof* could be thrown on him, to show himself a holder for value. The allegation in the *petition* as to this on which the counsel lays so much stress, was wholly unnecessary and immaterial. That fact could not come in question until some affirmative defence, good against the original holder, should be pleaded and proved; and so far as the answer showed, the burden of proof would remain throughout with defendant.

6. We contend for no such rule as that parol evidence is inadmissible to show that parties not appearing on the record were the real parties in interest, and as such conducted the suit. What we argue is, that when it has been expressly found by the court or jury, on an issue joined in the cause, that the plaintiff on the record *is* the real party in interest, the defendant cannot be allowed, in another suit in which he relies on the former judgment as an estoppel, to contradict such finding by extrinsic evidence. Stoddard v. Thompson, 31 Iowa 80, cited on the other side, will be found on examination to be in our favor on this point. The plaintiff, Stoddard, having placed certain notes in defendant Thompson's hands, under an agreement which defendant failed to perform, brought suit in equity to recover them back again, or their proceeds. On one of these notes Thompson had brought suit against the maker, which was defended by Stoddard in the maker's name, on the ground that Stoddard (and not Thompson, the plaintiff in that suit,) was the real owner of the note. This issue was determined in favor of Thompson; and it was held that Stoddard was thereby estopped in his subsequent suit against Thompson, from claiming the proceeds of the note or the judgment recovered thereon.

The question is, whether defendant was rightly permitted to prove, *not* that Smith held the coupons as an agent or trustee, but that he was a mere *nominal* plaintiff who had lent the use of his name. An agent or trustee, who sues for the benefit of his principal or *cestui que trust*, is not a nominal party. Neither Cottle v. Cole, 20 Io. 48, (cited by defendant), nor any other case that we have seen, holds that under a statute requiring the "real party in interest" to be plaintiff on the record, the owner of negotiable paper payable to bearer, can properly sue it in another's name, under a mere agreement by the nominal plaintiff to permit him to do so.

7. It is said (p. 11) that actions upon different coupons belonging to the same bonds, have been held to be founded on the same causes of action, as respects the defence of former adjudication. Successive suits for different instalments of principal or interest payable under the same bond or note, are in one sense, for the "same cause of action," being brought upon the same contract. In this argument, however we have used that phrase as descriptive of successive suits for the *same debt, sum* or *instalment*. If a note is given for $3,000, payable in equal instalments, in 1, 2 and 3 years from date respectively, we presume it is not incorrect to say that three distinct causes of action for the three several instalments, may arise thereon. This however is a mere question about words and names. The substantial fact is, that in the case just supposed, in pleading in bar of an action for one instalment the judgment in another action for a different instalment, it must be shown upon what grounds the judgment pleaded was based, and that they are applicable to *both* instalments; while the mere fact of a *judgment* for *either* party, in a former action, would bar a second action for the same instalment.

8. The reply to our 4th point, *ante*, we submit is wholly unsatisfactory. Even supposing it had been expressly found in the

Smith case that we gave no value for the coupons *then* in suit, the argument of the learned counsel when sifted, necessarily comes to this: It is true, that each coupon is a distinct instrument, capable of being negotiated by itself, and that therefore plaintiff might have held the coupons formerly sued on, without holding the bonds, or might have held those coupons and the bonds by wholly different titles. It is true also, that in the former action he sued on certain coupons alone, alleging no purchase or ownership of anything else, and that whether or not he held the bonds or any other coupons was neither in issue or material in that action. True, further, it does not appear what, or whether any, evidence was then adduced, as to the nature or source of his title, even to the coupons then in suit. *But*, as matter of fact, independent of anything then proved or decided, the plaintiff held the instruments then sued on, and those *now* sued on, by one and the same title; and *if* he had proved his title in the former suit, this would have appeared. It was then adjudged that he was not a holder for value of the coupons *then* in suit; and since, by reason not of any inherent necessity, but of the extrinsic fact *now* alleged, his attitude as a holder for value, or without value, must be the same in respect to those coupons, and to the bonds and coupons *now* sued on, it *follows*, that it was then *adjudicated* that he has paid no value for the instruments on which he now sues.

Was there ever a plainer attempt to extend the estoppel of a judgment to matters not embraced within it, by mere *argument*, upon facts not adjudicated? And was there ever a more glaring *non sequitur* in a conclusion? If it be assumed as a *fact*, that plaintiff gave no value for the coupons, and further, that he purchased the bonds in one transaction with the coupons, it may logically follow, as a fact, that he gave no value for the bonds. But fact is one thing, and adjudication is another. Courts and juries sometimes decide questions of fact wrongly; and though,

for the peace of society, and the end of litigation, suitors must be bound by their decisions on the issues actually before them, it would work intolerable hardship if verdicts or findings of fact were held to import absolute verity, for the purpose of being reasoned from in subsequent litigation, and by combination with new and extrinsic facts, could be made the instruments of forcing upon the parties still further conclusions of fact as being involved in the adjudication, and thereby made incontrovertible. The present case furnishes, we think, a forcible illustration of the hardship which would flow from such a doctrine, and of the wisdom of the rule laid down in the Duchess of Kingston's Case, referred to on p. 24, *ante*.

The concessions in our favor introduced into the foregoing statement of the argument on the other side, are only such as the facts of this case, disclosed by the record, require to be made. The learned counsel perhaps does not make them fully, but he seems to labor under some misapprehension as to what the record shows, especially as to the proceedings in the Smith case, the record of which he says (p. 2) is not before him. We have already pointed out some errors of statement, and must further dissent from what is said at the foot of page 15, if we interpret it aright. We do not understand it to be "averred", and it is certainly neither "proved" nor "admitted" that any common title to the bonds and the coupons sued in the Smith case, was "then and there adjudicated". Neither the record in that case, nor the bill of exceptions herein, furnishes any support to the contrary statement.

In conclusion we beg leave to observe, that though we have ventured under one head of this argument, to question the decision in Beloit v. Morgan, the Court may well decide the case in our favor on the other points (especially the last) without any conflict with that case. But it cannot, as it seems to us, affirm the judgment without taking a long step beyond anything heretofore

decided. If not prepared to recede from the advanced position then taken, will it go still further?

It is submitted that the judgment should be reversed and the cause remanded for further proceedings in conformity with the opinion of the Court.

JOHN N. ROGERS.
Counsel for Pl'ff. in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1876.

CHARLES T. CROMWELL, *Plaintiff in Error,*

against

THE COUNTY OF SAC, IOWA, *Defendant in Error.*

ARGUMENT.

GALUSHA PARSONS,
Of Counsel for Defendant in Error.

KENYON & PIERSON, Legal Printers, Des Moines, Iowa.

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BRIEF FOR DEFENDANT IN ERROR.

This action was brought upon four coupon bonds, of one thousand dollars each, alleged to belong to a series of ten, of which these were numbers *seven, eight, nine and ten.* The defense was a former adjudication, which was set forth in the answer in two forms first, generally—very nearly a literal copy from Chitty's Precedents—and second, specially that this plaintiff had formerly brought an action—commenced August 3, 1867, tried May 29, 1869—in the name of one Smith, as a nominal or fictitious p'aintiff, upon twenty of the coupons attached to these bonds being five to each of them—from *May* 1863 to 1867—in which judgment was rendered for the defendant.

It is alleged in that division of the answer:

1. That the former action was prosecuted by the present plaintiff solely for his own benefit, that Smith, the nominal plaintiff, had no interest in it.

2. That the coupons then sued upon were attached to the bonds now sued upon, at the time they were purchased by the plaintiff.

3. That the petition in that action alleged that the plaintiff "received the coupons in good faith and before maturity, and paid value therefor."

See petition in Smith vs. Sac County, closing paragraph.

4. That the court then adjudged the "bonds to be wholly void."

See judgment in that action—I have no copy of the record.

To this the plaintiff filed a reply, containing two divisions:

1. A general denial.

2. That he *purchased the bonds before maturity without notice and for value*, but without denying that the coupons formerly sued upon were *attached* to them at the time of his purchase, nor was there any allegation that he held the bonds by any other title than that set up in the answer as to the coupons and which was then litigated.

To this division of the reply the defendant demurred, and the demurrer was sustained. The issues were tried before a jury. Upon the trial, after the defendant had rested, the plaintiff offered to show that he purchased the bonds, *with the coupons attached*, in *March*, 1863—including all of the coupons described in the petition in the former action as belong-

ing to these bonds, 7, 8, 9 and 10—*and that he had ever since held them.* The court excluded the evidence.

The petition in the former action alleged just what is here offered as to the plaintiff's purchase, it was denied by the answer and decided against the plaintiff by the judgment in that action. The *bonds* were set out in the petition—one of them by copy and the others by reference—and the plaintiff sought to recover upon *their* validity, the issues then made all related to the *bonds*, as well as the coupons attached to them, for the amount of which alone the plaintiff asked judgment as the bonds were *not then due;* the court "adjudged the *bonds* and coupons wholly void." The plaintiff's title as a *bona fide* purchaser was distinctly in issue, first upon the allegations in the petition and the denial by the answer; and second, upon the affirmative allegation in the answer that he purchased them "with full and complete knowledge" of their invalidity.

I.

There is no such assignment of errors either in the transcript or the brief of counsel as is required by statute and the rules of this court.

Rev., Stats. Sec. 997.
Rule 21.
17 Wall., 63; 20 *id.*, 652; 21 *id.*, 71.
91 S. C., R. 648.

II.

This court has at least three times within the last eight years decided the *exact* question which counsel for the plaintiff in error *claims* to be now here.

Anrora City vs. West, 7 Wall., 82
Beloit vs. Morgan, *id.* 619.
Gould vs. Evansville R. R. Co., 91 S. C., R. 526.

The question argued, however, is not involved in this case. It was not as the argument assumes it to have been in the former action some "collateral fortuitous or accidental" *circumstance*, but it was the precise question raised by the issues and decided by the court in that action; "the same cause of action, within the meaning of the rule, as declared by *this* court"—7 Wall., 96—"the *title* involved was the same" *id.* 621.

Whatever may be the weight of the authorities as to the force of an adjudication as an estoppel upon matters purely collateral there is no difference of opinion as to such as are directly in issue and actually decided.

If the views of this court have undergone no modification since it decided *Buck vs. Colbath*, 3 Wall., 334, this argument ought to end here. "Parties should not be encouraged to speculate on a change of the law when the administrators of it are changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants challenging the justice of their well considered and solemn judgments." Of the questions now sought to de raised it may be said, as was said by this court in *Wright vs. Sill*—2 Bl., 544—of the questions then before it. "They have been repeatedly before this court, and uniformly decided in the same way, whatever differences of opinion may have existed originally in regard to them, or might now exist if they were open for reconsideration, it is sufficient to say they are concluded by these adjudications. The argument upon both sides was ex-

hausted in the earlier cases. It could subserve no useful purpose again to examine the subject." But as I may be mistaken both as to the sufficiency of the assignment of errors, and the application of the decisions above cited to this case, perhaps I ought to *run over* the argument on the other side.

III.

Plaintiff's brief:

P. 3. "The issue joined as to Smith's *ownership*."

There was no such issue. Nothing is better settled than that a general denial in an action brought by one as "holder or bearer" does not put in issue his *ownership*.

P. 4. "The defendant's demurrer to the reply."

1. It was not proper matter for a reply or in avoidance—it was not *new* matter in defense of anything contained in the answer—Iowa Code—at most it only went in *aid of the petition*.

2. It denied nothing contained in the answer, and stated no fact not stated in the petition in Smith's case, which was annexed to and made a part of it. It was a mere effort to raise an issue *of fact* upon the *sufficiency* of the answer.

3. The ruling upon the demurrer was waived by going to trial upon the other issues, under which—*nul tul record*—the same question could be and *was* raised.

4. The ruling upon the demurrer upon the authorities above cited was clearly right. The dissenting opinion of his Honor, Judge Miller, in *Aurora vs. West*, very earnestly relied upon by counsel, is entirely with us so far as anything in this case is concerned. Whether what *might* have been determined but was not is concluded or not, that opinion is very far from intimating that matters actually in issue can be retried *ad libitum*, on the contrary it says when it "appears that the cause of action in the second suit was the same that it was in the first suit, *or* depended upon precisely the same facts," the former adjudication is a good plea in bar; p. 106.

P. 4. "The coupons sued upon in the former action were those maturing prior to May, 1867. * * Nothing was alleged as to the ownership of the bonds or the remaining coupons."

1. The answer set up that they were held by the same title, that the *bonds* were purchased with *those* coupons attached; the petition in that case shows the number of the coupons and of the bonds to which they belonged. All this was *proved* upon the part of the defendant, and no question is raised by the bill of exceptions upon that subject. The offer relied upon as stated in the bill of exceptions, and referred to, but not fully stated upon page six of the argument, was to show that *this plaintiff*—or Clark as to two of them—purchased the bonds now in suit in *March*, 1863, *with the coupons attached*, and that he had *held them ever since*.

It is submitted that this would be something more than

"argument" both as to the ownership of the bonds and coupons and the identity of the title now in question with that formerly litigated.

P. 5. "With notice * * * failure of consideration."

What we claimed in the former suit, and what the court adjudged was, that one who purchases instruments of this character, "with full knowledge" that they are *fraudulent* takes them subject to any defense which could be made against them in the hands of the party from whom he received them.

P. 5. "No finding as to whether the plaintiff was or was not a holder for value."

Our ideas as to the former case were:

That a *bona fide* holder is one who:

1. Purchases before maturity;
2. For value;
3. Without notice.

All this was alleged in the petition and denied by the answer. In *addition* to that the answer affirmatively alleged that the plaintiff had notice and that he took the bonds subject to all defenses.

Upon the trial it was shown that the bonds were fraudulently issued. As we understand the law independent of the allegations of the answer, the plaintiff could not then recover without showing *all* of the facts necessary to make him a *bona*

fide holder. The first was shown, but the others were not. This being a subject upon which he had the burden of proof as the case then stood, we suppose in the absence of an affirmative finding upon it the issue would be decided against him, not by stating every possible *negative* but by a statement of the facts *found*, upon which the law would pronounce the judgment, and that such judgment would be conclusive upon everything *in issue*. The offer upon this trial was not to show that evidence was not given upon the same subject upon the former trial, but to try that question now, because it did not appear from the finding whether evidence was or was not given upon it although such finding was necessarily included in the *judgment* then rendered. As I understand the law where the court finds all of the facts established by the evidence, if they are not sufficient to support the claim of the party upon whom rests the burden of proof, the judgment must be in favor of the other party, and that its conclusiveness as a plea in bar does not at all depend upon the evidence given.

If there was but a single matter in controversy—*res contestatio*—that everything within the scope of the issues as to that matter is at an end.

P. 8. "It will hence be seen."

The issues upon that trial were

1. Whether the bonds were valid or invalid;

2. Whether the plaintiff was as he alleged a *bona fide* holder, and in a position as such to *estop* the county from showing their invalidity.

The pleadings were so framed as to present these questions, and questions as to their technical sufficiency are raised for the first time upon this page of counsel's argument. How he can

say with the former petition before him in which the plaintiff alleged "that he received the coupons in good faith before maturity and paid value therefor," and the general denial in the answer, and the further statement that he took them with *knowledge* of the defense then pleaded that "there was nothing upon the record to advise the plaintiff that he must be prepared on the trial to prove that he or those under whom he claimed were holders for value" I cannot understand, unless upon the unreasonable and scarcely respectful assumption that he has overlooked the allegations in this respect in the former pleadings.

P. 9. "We are now prepared to prove facts which will entirely rebut the defense which prevailed in the former action"

In other words, they now understand either the law or the facts of the case better than they did then, and think that the "inexorable rules of the law," which will not allow them to try a second time to collect from the defendant through the aid of an estoppel a debt that it never owed, ought to give way.

P. 9. "Was it competent for the defendant to contradict the record" by showing that the plaintiff was the real party in interest in the action brought by him in the name of Smith?

If it was not competent to show who the real party in interest in that action was this court in common with all of the courts in this country and in England, and the elementary writers have been a great many years laboring under a mis-

take. Freeman on Judgments lays down the rule in this way: "For the purpose of showing that parties not named in the record were the real parties in interest and conducted the suit in the name of others, who were only nominal parties, parol evidence may always be offered and when the showing is made the real parties, are concluded by the judgment." Sec. 175. To the same effect are Greenleaf—§§522-3—and Taylor on Evidence—§1513—both of which are referred to by this court in the cases above cited. The Iowa statutes are referred to to show that actions must be brought in the name of the real party in interest.

It has been decided in cases almost innumerable that the *holder or bearer* of instruments so payable, has the *legal* title, and may sue as such, subject to the right of the defendant to avail himself of any defense which he may have against the party beneficially interested.

"One who, though not a party who defends or prosecutes an action by employing counsel, paying costs, and doing those things which are usually done by a party is bound by the judgment rendered therein."

Stoddard vs. Thompson, 31 Iowa, 82.

"It is by no means true that in order to constitute an estoppel by judgment the parties on the record must be the same. The term has a broader meaning. It includes the real and substantial parties who, although not upon the record, had a right to contest the proceedings."

Castle vs. Noyes, 14 N. Y., 335.

"The course of decisions in this state establishes this rule, viz: That the party holding the legal title to a note or instrument may sue on it, though he be an agent or trustee, and liable to account to another for the proceeds of the recovery, but the case is open to any defense which exists against the party beneficially interested. * * Holding as the plaintiff did the legal title to the judgment by assignment, he

could sue upon it, and his right to recover could not be defeated by simply showing that another was the party beneficially interested in the action. *This alone would not constitute a defense.*"

Cottle vs. Cole and an., 20 Iowa, 485.

P. 10. "It is emphatically the findings." We say the cause of action was the same in each case, in each it was the bonds. The holder of the coupons being entitled to receive the *interest.*

P. 11. "At the outset * * it will be well to call attention to the difference."

This is a difference which has not escaped the attention of this court, indeed its special attention has been very often called to it; if counsel will examine its decisions he will discover that he has placed himself upon our side of it. In each of the cases above referred to, in speaking of actions upon coupon bonds, this court says that within the rule as to pleading judgments in bar, *the supposed causes of action* are the same.

The instances of defenses supposed by counsel, payment, and the like, can certainly require no reply. No one ever thought that payment of the interest, although collected by judgment could be pleaded in bar to an action for the principal subsequently falling due.

P. 13. "As we have seen the defense which prevailed in the Smith case was found coupled with the want of proof."

Plaintiff, in that action, affirmed :

1. The validity of the bonds, he set them out in his petition, and produced them upon the trial ;

2. That he was a *bona fide* holder of the coupons.

Upon this trial it appeared that Smith was the present plaintiff by another name ; that he, as Cromwell or as Smith, purchased the *bonds*, and in *that way* acquired the title to the coupons, which title he then sought to maintain, and which he submitted to the judgmeut of the court, and upon which the court decided "that the *bonds* and coupons are wholly void." *See judgment.* And the plaintiff having the burden of proof and having failed—as counsel says—sufficiently to prove this allegation, or the preponderance of the evidence being the other way, or there being an entire "want of proof" upon the subject, and mistaking either the law or the weight of the evidence, or relying upon having shown the validity of the bonds irrespective of the question of estoppel, submitted his case *as he had then made it* to the judgment of the court.

If a question like that admits of discussion the office of reporter to this court might as well be abolished.

Freeman on Judgments, Sec. 272.

The error which runs through all the argument it seems to me is just this: Counsel does not distinguish between what was *in issue* and essential to maintain the former action and which was necessarily embraced in the judgment rendered, and mere circumstances and matters of evidence coming up during the progress of the trial, and which might or might not exist without affecting the *rights* of the parties. It is with respect to the latter that the courts speak when they say that an estoppel cannot be made out by *argument*, and the point of the discussion has generally been whether in a particular case the *facts* were or were not collateral ; but not one of the

"six cases" upon which counsel asks your Honors to reconsider your own decisions made *since* they were decided and in print, holds or intimates by the most distant intendment, or by any possible elasticity of language that matters directly in issue upon a single indivisible cause of action are not concluded by the judgment in the case. There are cases which hold that when a declaration embraces a plurality of subjects it may be shown by parol that some one of them was not submitted to the jury, but there is no case which holds that because the jury thought the evidence insufficient the case may be submitted to another jury. The contrary is not only "elementary" but exceedingly elementary, yet the argument must come to that. The plaintiff's right to recover upon the title which he then held was the subject before the court, he gave evidence upon that subject and submitted his case for judgment. He now asks upon the same title to give *farther evidence*. As well might one whose carriage was injured upon the highway submit his case upon proof of an injury to the right wheel and afterwards maintain a second action for an injury to the left wheel, because as to that his proof was insufficient or because there was "a want of proof" upon the first trial.

"It seems to us to set at nought a solemn adjudication on the parol showing of the existence of a defence at the time it was rendered, would make judgments of less value than the recollections of a witness, and a judicial record but a by-word and reproach."

Dewey vs. Peck, 33 Iowa, 245.

P. 15. "It was argued by the plaintiff * * * that it was a rule of evidence."

Again counsel confounds the existence of the right with the evidence of its existence. The plaintiff in the former

action might have recovered either because the bonds were in fact duly executed by the defendant, or because the defendant at the time of his purchase *admitted* their due execution, for that I understand to be the effect of the estoppel claimed. In either case his recovery would be upon the bonds.

The estoppel would not be his *cause* of action, but *one way* of supporting his action. If he saw proper to submit his case upon some other way of supporting it, should he be allowed to try it a second time because he has learned since or *by* the former judgment that the way that he now proposes would have been a better one?

P. 16. "The judgment has the effect of a non-suit for lack of evidence."

Upon what ground is a judgment ever rendered against a party having the burden of proof but for "*lack of evidence*"? If in this case the plaintiff should be allowed to contradict the record by showing that matters in issue, and decided in the former action, were not in fact tried, or to have a judgment upon the merits declaring the bonds and coupons void, held a mere non-suit and thereby to avoid its effect as an adjudication, because he lacked the evidence upon that trial which would have enabled him to shut out a defense upon the merits, and in that way to obtain an unconscionable advantage over the defendant and to compel it to pay what it did not owe, to what kind of a case should the plea of a former adjudication be held appropriate?

If estoppels, as counsel says, p. 22, are *stricti juris*, (your Honors have said that a plea of former adjudication is to be looked upon with favor) it becomes those who would avail themselves of them to be *vigilant*.

P. 19. "Estoppels * * are conclusive only as to the facts which were directly put in issue and determined in the former suit."

If that is not this case it is not because the precise question now sought to be litigated was not in issue in the former suit, but because the court did not state in its report not only everything that it did find, but everything that it did not find. To support the judgment then rendered it was not necessary —as your Honors held when the case was here for review— that the court should have found that the plaintiff did *not* pay value, upon the facts found it was necessary that it should appear that he *did* pay value. The argument can have no other premises than, that in any case though founded upon a single indivisible cause of action if the plaintiff submits his case for final judgment upon insufficient evidence it is to be considered a *non-suit*.

P. 22. Counsel's fourth point, stated with some degree of formality as something *new*, unless I have misapprehended what precedes it and what I have been attempting to answer, is new only in the sense of saying it over again.

I understand the *whole* argument to be directed to the effect of a judgment brought to recover the interest, upon a subsequent action brought for the recovery of the principal, or as applied to the facts of this case the effect of the judgment in the action upon the twenty interest coupons cut from the bonds now in suit, in which the plaintiff in his petition described the bonds themselves and sought to maintain their validity, upon the action now brought to recover the principal.

The argument says "there is no necessary connection between the coupons then sued upon and the bonds now in suit."

That is to say, where one purchases bonds with attached

coupons before the maturity of either, he does not necessarily hold them by the same title, or at least that whether he does so or not is mere matter of argument. He may be a *bona fide* holder of the principal but not of the interest which it earns. If this is good reasoning the mysteries of the law like those of Scotch metaphysics, are past finding out,—it becomes our Philadelphia brethren to look to their laurels—it would be open to debate whether it would not be an improvement upon the system to substitute divination and the study of the stars for our present "perfection of human reason" in the way of administering justice. Farther on counsel speaks of this connection as "extrinsic, fortuitious and accidental." As well might it be said in the instance given upon the twenty-eighth page of the argument, that the colt while *en ventre sa mere* was an extrinsic, fortuitous and accidental circumstance, and that an action brought for the recovery of the mare while in that condition would be no bar to a subsequent action brought for the recovery of the colt. Again, in the case of the two mills, the analogy would have been more pertinent —and complete only then—if they had been run by the *same wheel*, as it stands the case decides only that a saw-mill is not a grist-mill, and that what will obstruct the one may not the other, at least whether it would do so or not is said to be matter of argument.

P. 28. "There is neither averment, evidence nor argument * * that the common title was actually given in evidence."

It is averred, proved and *admitted* that the coupons were attached to the bonds when purchased, and—what was doubtless unnecessary—that they were held by the same title, and that that title was then and there adjudicated. To have re-

peated it oftener, or to have gone farther, would have been to follow the example of the satirists in one of their standing flings at the verboseness of the law, in which an orange "and all of the appurtenances thereunto belonging" is minutely described by metes and bounds.

If anything can be more certain "to every intent in particular" than the allegations of the answer, it was an oversight in not making it so, and by the evidence none of its allegations were left unproved.

With the decisions of this court before me, even if the assignment of errors were sufficient and the questions which counsel argues not only were involved but properly here for review, I cannot but think it would be an unprofitable waste of your Honors' time, more valuable than my own, either to examine the cases which he supposes to be at variance with those of this court, and to which the latter ought to yield, or to cite others in support of the principles which they assumed and which the court then announced. The court as then constituted did not, as the course of argument pursued by counsel, would seem to imply, overlook the current of the authorities, or fail to appreciate either the distinctions now suggested or the principles lying at the foundation of the rule which it declared. If everything in this case were entirely new before this court I cannot think that there would be the least doubt as to what its decision would be upon the questions *actually* involved, nor do I think there would be much as to those which counsel supposes to be involved. After examining all of the cases cited—if it does not imply disrespect to counsel or indicate very great obtuseness upon my part—while perhaps one or two of them may be a little questionable as to the proper application of

the rule to the facts then before the court, it does not seem to me that any of them are at all in conflict with the decisions of this court *as to aay question now here.* For example, nothing is better settled in New York than that where one sues upon a single indivisible demand, or when he brings separate suits upon the same title, he must bring forward his whole case upon the first trial, and that a judgment in that case will be conclusive in any subsequent litigation as to the claim or title then asserted, not only as to anything that was actually determined but as to everything that *might* have been determined under the issues—the effect of a judgment by default as in some of the cases cited by counsel from the reports of that state, I do not think it necessary to consider—and this not as an estoppel merely, but as a technical plea in bar. The rule to this extent has been repeatedly recognized by the courts of that state without question since the decision of any of the cases cited by counsel, nor do these cases as I understand them question it. The distinction between such a case, or between the case now here and those in which *several* demands were in controversy, upon some of which no evidence was given, or where by reason of a system of pleading by which the record does not show, except in a general way, what was in controversy, it seems to me is too obvious to admit of discussion.

It is submitted, first, that the assignment of errors brings nothing here for review; and second, if your Honors should see proper to disregard its insufficiency and to look into the record, that instead of any "plain errors not assigned" you will find no ruling which is not clearly sustained by the decisions of this court.

GALUSHA PARSONS,
of Counsel for Defendant in Error.